

IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Y 4. IN 2/11: S. HRG. 104-399

Implementation of the Native Americ...

HEARING BEFORE THE COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE ONE HUNDRED FOURTH CONGRESS FIRST SESSION

OVERSIGHT HEARING ON PUBLIC LAW 101-601, TO PROVIDE THE AUTHORITY AND MECHANISM FOR THE REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS, FUNERARY OBJECTS, SACRED OBJECTS, AND OBJECTS OF CULTURAL PATRIMONY

DECEMBER 6, 1995
WASHINGTON, DC



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IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT, [PUBLIC LAW 101-601]

WEDNESDAY, DECEMBER 6, 1995

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (vice chairman of the subcommittee) presiding.

Present: Senators Inouye, Dorgan, and Campbell.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Good morning. I am pleased to welcome all of you to this hearing this morning on the implementation of the Native American Graves Protection and Repatriation Act.

The chairman of the committee, Mr. McCain, had planned to be here to chair this meeting, but was advised late yesterday that he would be needed to address matters of national security in Bosnia at another committee.

Enacted into law at the end of the 101st session of the Congress, this act provides the authority and mechanism for the repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. Final regulations of the implementation of the act were published in the "Federal Register" on Monday of this week.

Since its enactment, more than 2,700 Native American human remains, nearly 123,000 associated funerary objects, 16 objects of cultural patrimony, and 212 sacred objects have been repatriated.

In the 101st session of the Congress, the committee held an oversight hearing on the initial activities associated with the implementation of the act, and this morning the committee meets to receive an update on the implementation of the act.

In one of the first legal actions to be brought under the act, a Native Hawaiian organization, Hui Malama I Na Kupuna O Hawai'i Nei, sued the Secretary of the Navy and the Bernice Pauahi Bishop Museum, asserting that, first, the Secretary had violated the act by failing to expeditiously return Native Hawaiian human remains that had been disinterred from the Mokapu Peninsula and, second, in conducting additional scientific research on the remains, the Secretary further violated the act.

This litigation has raised several interesting questions, some of which I believe we did not anticipate at the time the Congress was considering the act.

Following their testimony, I would like to call upon the witnesses to share with us any views they may have on some of the issues raised by this litigation.

One of the issues of first impression is whether Native American human remains have standing under the law in their own right to assert an injury based upon the violation or desecration of those remains.

In this action, Hui Malama asserted that, according to Hawaiian custom, human remains are spiritual beings which possess all of the traits of a living person.

The Federal district court in Hawaii concluded that there was no such standing under the act because the act classifies human remains as cultural items and fails to list human remains as legally-recognized persons or as an entity with legally-protected interests under the statute.

The court went on to find that there would be no standing under common law, either, because the human remains could not demonstrate that they had suffered an injury, in fact, even though the court notes other non-human entities such as animals and natural habitats and other inanimate objects such as ships and corporations have been accorded standing.

The court concludes that Hui Malama has not shown that a comparable identifiable benefit to living members of society would result from affording standing for human remains.

The court also discussed the notion of an action being brought by a person or entity in a guardianship capacity for human remains, but finds no authority for guardian-initiated action in this act.

This finding poses the interesting legal question of who may assert the right to protection on behalf of human remains if there is no readily-identifiable descendent or relative.

The second concern that Hui Malama sought to have the court address was whether information derived from additional scientific research conducted on the remains could be protected from public disclosure by one of the exceptions to the Freedom of Information Act.

The court finds that the inventory of the Mokapu remains is subject to the Freedom of Information Act and finds that the Native American Graves Protection and Repatriation Act is not a "withholding statute" for purposes of the Freedom of Information Act because the act does not indicate that any inventory results are to be confidential or privileged in any respect.

In addition, the court finds that the Freedom of Information Act exemption that protects individuals from invasions of privacy—an exception that aims to protect individuals from public scrutiny regarding personal affairs—does not apply because it is intended to protect information regarding particular living persons.

Finally, the court concludes that the exercise of this power of equity to protect information about remains would be inappropriate on the basis of its findings that there are no extreme or exceptional circumstances and that the plain language of the statute does not exempt inventory information from public disclosure.

Further, the court finds that the Native American Graves Protection and Repatriation Act does not prevent museums or Federal agencies from conducting additional scientific studies or research on human remains except after completion of the initial inventory.

I've taken time to raise these matters because they impress me as important considerations that Native people may want to have the Congress address, particularly given the fact that this ruling will not be appealed. So, as of this moment, it is the law of the land.

Again, I want to urge any of the witnesses who may wish to do so to address these issues as they present testimony to the committee today, and we will keep the record open, if such is necessary, so that witnesses and other interested parties may submit additional testimony.

[Text of Public Law 101-601 follows:]

PUBLIC LAW 101-601—NOV. 16, 1990

**NATIVE AMERICAN GRAVES
PROTECTION AND REPATRIATION
ACT**

Public Law 101-601
101st Congress

An Act

Nov. 16, 1990

[H.R. 5237]

vs

To provide for the protection of Native American graves, and for other purposes.

Native American Graves Protection and Repatriation Act.
Hawaiian Natives. Historic preservation. 25 USC 3001 note. 25 USC 3001.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Native American Graves Protection and Repatriation Act".

SEC. 2. DEFINITIONS.

For purposes of this Act, the term—

(1) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) "cultural items" means human remains and—

(A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native

American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) "Federal agency" means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) "Federal lands" means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.

(6) "Hui Malama I Na Kupuna O Hawai'i Nei" means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) "museum" means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) "Native Hawaiian organization" means any organization which—

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) "Office of Hawaiian Affairs" means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as

applied in section 7(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

- (14) "Secretary" means the Secretary of the Interior.
- (15) "tribal land" means—
 - (A) all lands within the exterior boundaries of any Indian reservation;
 - (B) all dependent Indian communities;
 - (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

25 USC 3002.

SEC. 3. OWNERSHIP.

(a) **NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.**—The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act shall be (with priority given in the order listed)—

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) **UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.**—Native American cultural items not claimed under subsec-

Claims.

Regulations.

tion (a) shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8, Native American groups, representatives of museums and the scientific community.

(c) **INTENTIONAL EXCAVATION AND REMOVAL OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.**—The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if—

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.) which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and

(4) proof of consultation or consent under paragraph (2) is shown.

(d) **INADVERTENT DISCOVERY OF NATIVE AMERICAN REMAINS AND OBJECTS.**—(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) **RELINQUISHMENT.**—Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

SEC. 4. ILLEGAL TRAFFICKING.

(a) **ILLEGAL TRAFFICKING.**—Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

“§ 1170. Illegal Trafficking in Native American Human Remains and Cultural Items

“(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

“(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.”

(b) **TABLE OF CONTENTS.**—The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

“1170. Illegal Trafficking in Native American Human Remains and Cultural Items.”

SEC. 5. INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS.

(a) **IN GENERAL.**—Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b) **REQUIREMENTS.**—(1) The inventories and identifications required under subsection (a) shall be—

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term “documentation” means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be

construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) EXTENSION OF TIME FOR INVENTORY.—Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) NOTIFICATION.—(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information—

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

Federal Register, publication.

(e) INVENTORY.—For the purposes of this section, the term “inventory” means a simple itemized list that summarizes the information called for by this section.

SEC. 6. SUMMARY FOR UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY.

25 USC 3004.

(a) IN GENERAL.—Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b) REQUIREMENTS.—(1) The summary required under subsection (a) shall be—

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

Museums.

(C) completed by not later than the date that is 3 years after the date of enactment of this Act.

(2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

25 USC 3005.

SEC. 7. REPATRIATION.

(a) **REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS.**—(1) If, pursuant to section 5, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5, or the summary pursuant to section 6, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where—

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable

lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

(b) **SCIENTIFIC STUDY.**—If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) **STANDARD OF REPATRIATION.**—If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) **SHARING OF INFORMATION BY FEDERAL AGENCIES AND MUSEUMS.**—Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) **COMPETING CLAIMS.**—Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

(f) **MUSEUM OBLIGATION.**—Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

SEC. 8. REVIEW COMMITTEE.

25 USC 3006.

(a) **ESTABLISHMENT.**—Within 120 days after the date of enactment of this Act, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7.

(b) **MEMBERSHIP.**—(1) The Committee established under subsection (a) shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(c) **RESPONSIBILITIES.**—The committee established under subsection (a) shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to—

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

(d) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of this Act.

(e) **RECOMMENDATIONS AND REPORT.**—The committee shall make the recommendations under paragraph (c)(5) in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(f) **ACCESS.**—The Secretary shall ensure that the committee established under subsection (a) and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(g) **DUTIES OF SECRETARY.**—The Secretary shall—

(1) establish such rules and regulations for the committee as may be necessary, and

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(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(h) ANNUAL REPORT.—The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(i) TERMINATION.—The committee established under subsection (a) shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

SEC. 9. PENALTY.

(a) PENALTY.—Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

(b) AMOUNT OF PENALTY.—The amount of a penalty assessed under subsection (a) shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

- (1) the archaeological, historical, or commercial value of the item involved;
- (2) the damages suffered, both economic and noneconomic, by an aggrieved party, and
- (3) the number of violations that have occurred.

(c) ACTIONS TO RECOVER PENALTIES.—If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) SUBPOENAS.—In hearings held pursuant to subsection (a), subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

SEC. 10. GRANTS.

(a) INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS.—The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) MUSEUMS.—The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6.

SEC. 11. SAVINGS PROVISIONS.

Nothing in this Act shall be construed to—

- (1) limit the authority of any Federal agency or museum to—
 - (A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

Museums.
25 USC 3007.

Courts.

25 USC 3008.

25 USC 3009.

- (B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;
- (2) delay actions on repatriation requests that are pending on the date of enactment of this Act;
- (3) deny or otherwise affect access to any court;
- (4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or
- (5) limit the application of any State or Federal law pertaining to theft or stolen property.

25 USC 3010.

SEC. 12. SPECIAL RELATIONSHIP BETWEEN FEDERAL GOVERNMENT AND INDIAN TRIBES.

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

25 USC 3011.

SEC. 13. REGULATIONS.

The Secretary shall promulgate regulations to carry out this Act within 12 months of enactment.

25 USC 3012.

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated such sums as may be necessary to carry out this Act.

25 USC 3013.

SEC. 15. ENFORCEMENT.

Courts.

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

Approved November 16, 1990.

LEGISLATIVE HISTORY—H.R. 5237:

HOUSE REPORTS: No. 101-877 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 136 (1990):

Oct. 22, considered and passed House.
Oct. 25, considered and passed Senate; passage vitiated.
Oct. 26, reconsidered and passed Senate, amended.
Oct. 27, House concurred in Senate amendments.



Senator INOUYE. This morning we have two panels, and I would like to call upon the first panel: The associate director of the Cultural Resource Stewardship and Partnerships, National Park Service, Katherine H. Stevenson; the chairperson of the Review Committee of Santa Clara Pueblo, Tessie Naranjo; and a member of the Review Committee and of the Peabody Essex Museum of Salem, Massachusetts, Dan Monroe.

Ladies and gentlemen, welcome. May I call upon Associate Director Stevenson.

STATEMENT OF KATHERINE H. STEVENSON, ASSOCIATE DIRECTOR, CULTURAL RESOURCE STEWARDSHIP AND PARTNERSHIPS, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY FRANCIS McMANAMON, DEPARTMENTAL CONSULTING ARCHAEOLOGIST

Ms. STEVENSON. Thank you, Mr. Chairman.

Mr. Chairman, I very much appreciate this opportunity to offer the views of the National Park Service and the Secretary of the Interior on the implementation of the Native American Graves Protection and Repatriation Act.

I have formal remarks, which I'd like to submit for the record, and then, if I may, a synopsis of my remarks.

Senator INOUYE. Without objection, the full statements of all our witnesses will be made part of the record.

Ms. STEVENSON. Thank you, Mr. Chairman.

NAGPRA was enacted on November 16, 1990, to address the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony with which they are affiliated.

The Secretary of the Interior is responsible for implementing in three separate areas: Development of regulations, establishment of a grants program, and establishment of a Review Committee to advise on regulations and assist in implementation.

As far as the regs are concerned, as you have mentioned, the final regs have been published on December 4, 1995, and I have a copy of those for people who may not have a copy, since it was so recent.

On May 28, 1993, we published the proposed regulations. We received many, many comments. There was much consultation with the Review Committee during the period September 23 through May 1994. The draft final rule was published in September 1994 and received extensive and thorough review. The final rule was published, as I just said, on December 4.

In terms of the grants, we had funds appropriated in fiscal year 1994, fiscal year 1995, and they are proposed for fiscal year 1996. During that period we awarded 83 grants totaling \$4.37 million. Those grants helped assist educational workshops, inventories, reviews, and coordinated discussions.

The Review Committee was established in April 1992. They have met 11 times. They have been deeply involved with the regulations, and they have facilitated resolution of disputes when they have been called to their attention. They have been dedicated and re-

sponsible colleagues, and I'd like to offer them my compliments and thanks for being such a delight to work with.

Thus far, 847 museums and Federal agencies have provided summaries to the Indian tribes and Native Hawaiian organizations. The inventories are now being sent. We have received 459 thus far but, as you know, the deadline is not until next May.

The museums and Federal agencies have announced, as you just said, willingness to repatriate 2,713 human remains, 122,000 funerary objects, 212 sacred objects, and 16 of cultural patrimony.

As you know, you've been very supportive of this bill and of our agency's efforts to implement the bill. We need your support to assure that its complicated and very sensitive process continues. We also ask your indulgence as we downsize and live within our budget. Things may slow down as more notices are published and therefore the potential for disputes grows.

We appreciate very much your willingness to have us testify here today.

That concludes my remarks. Thank you very much.

[Prepared statement of Ms. Stevenson appears in appendix.]

Senator INOUYE. Thank you very much, Ms. Stevenson.

I will question the witnesses as we go along instead of waiting until the full panel concludes.

Ms. Stevenson, in your testimony you indicated that 337 grant proposals were submitted, and with a total request of over \$30 million, and you have indicated in your testimony that the grant program is needed now more than ever.

Ms. STEVENSON. Yes, sir.

Senator INOUYE. What level of funding on an annual basis would be adequate to meet this need?

Ms. STEVENSON. We have requested in the past few years \$2.29 million to continue the grant program authorized under NAGPRA. We anticipate that for 1996, and we're very hopeful that we'll receive that appropriation.

Senator INOUYE. Would \$2.3 be sufficient, although you requested nearly \$30 million?

Ms. STEVENSON. That's the Administration's request, Senator.

Senator INOUYE. Are you suggesting that \$27 million worth of grant requests were inappropriate?

Ms. STEVENSON. No, sir; not under any circumstances. These times of fiscal restraint make it very, very difficult for us to meet these requests, and—

Senator INOUYE. And these are—

Ms. STEVENSON[continuing]. Of course, any additional funds are welcome.

Senator INOUYE. These are appropriate?

Ms. STEVENSON. They are very appropriate requests.

Senator INOUYE. So if funds were available, you would be requesting \$30 million?

Ms. STEVENSON. If funds were available, we would be requesting \$30 million.

Senator INOUYE. Is this matter given high priority in your agency?

Ms. STEVENSON. Yes, sir; it is. I think it is worthwhile noting that, while other programs have received rather significant cuts,

this has stayed at the level and the 1995 and 1996 budget had remained stable, which I think one couldn't say about many of the other programs.

Senator INOUYE. Ms. Stevenson, as you are aware, most of the tribes are recognized by the Federal Government and some are recognized by States. Do you include Indian tribes that are recognized by States in which they are located but which may not be federally-recognized as Native Americans?

Ms. STEVENSON. The definition we have chosen to use is consistent with the usage developed in connection with the American Indian Self-Determination Act, which limits standing to Indian tribes and Alaska Native villages and corporations recognized as eligible for the special programs and services provided by the Bureau of Indian Affairs [BIA] because of their status as Indians. We chose this definition for consistency within the Department of the Interior.

Senator INOUYE. Do you not believe that these are men and women who lived on this land many centuries ago and they are Indians, no matter whether we recognize them or the States recognize them?

Ms. STEVENSON. I believe that personally, sir. I think the Department of the Interior has to have standards which are fair and equally applied to all the people with whom we work, and that's why we chose this definition.

Senator INOUYE. On the matter of extending respect for those who have departed, do you not think standards should be universal? Or would the Department object if an amendment is provided that would cover the State-recognized Indian tribes?

Ms. STEVENSON. I think we'd have to think pretty seriously about that, and we'd be happy to get back to you on that very serious question.

Senator INOUYE. Thank you. Do you believe that it would be helpful or advisable for the Congress to amend this act to authorize legal actions to be initiated by those who may qualify to stand in a guardianship capacity for human remains in order that the Native American human remains are not desecrated in any inventory process or in any other aspect of the repatriation process? This is in response to the recent decision that I cited.

Ms. STEVENSON. You raise some very serious issues here, Senator, and I wouldn't want to answer quickly and not have us have a chance to think about them very seriously and make some suggestions to you with some thought.

Senator INOUYE. Will you have your counsel look at this and respond to us?

Ms. STEVENSON. Yes, sir; we will. Thank you very much.

Senator INOUYE. And the same thing about whether information about the remains should be exempted from the public disclosure under the Freedom of Information Act.

Ms. STEVENSON. We'll provide a thoughtful response to you, sir.

[Information provided in Ms. Stevenson's prepared statement which appears in appendix.]

Senator INOUYE. In your testimony you stated that in the past 2 years 337 grant proposals had been submitted and 83 were fund-

ed. Of the 83 grant awards, how many went to tribes in fiscal year 1994 and 1995?

Ms. STEVENSON. Roughly one-half went to tribes and one-half went to museums. We can provide a breakdown of all of those grant awards if you wish.

Senator INOUYE. I believe that would be most helpful.

Ms. STEVENSON. Yes, sir.

[Information follows:]

In fiscal year 1994, 16 grants were provided for Indian tribes, and in fiscal year 1995 the number of grants to Indian tribes was 22, for a total of 38 grants. In addition, many of the grants to museums, for compliance with the NAGPRA inventory requirement, included funds to provide for members of Indian tribes to travel to museums for consultations or otherwise supported Indian tribe activities related to NAGPRA.

Senator INOUYE. The act requires that museums and Federal agencies are required to conduct inventories and submit summaries of their collections. You also mentioned in your testimony that there have been a number of museums that have applied for extensions. How many museums have requested and applied for extensions?

Ms. STEVENSON. As you know, the inventories are required to be done by November 16, but they don't need to be—the tribes don't need to be notified until May 16. So we anticipate, although we've received 459 inventories, that some will still be coming in.

Up to now, 73 museums have appealed to the Secretary for extension to the deadline. Most anticipate that they'll be done by November 16, 1996, and about 21 museums have asked for longer periods of time.

We are now evaluating those appeals and will make recommendations to the Secretary on ones that are appropriate for extensions.

Senator INOUYE. So, in your view, it is moving along according to schedule?

Ms. STEVENSON. It's moving along, sir. Yes, sir.

Senator INOUYE. It is my understanding that it was Congress' intent to encourage repatriation and not to delay or limit the authority of a museum to repatriation. However, it has been brought to my attention that section 10.10.B.2 of the regulations would prevent any repatriation of human remains and associated funerary objects until after a museum finally completes its inventory. Is that correct?

Ms. STEVENSON. Apparently not, sir. If I may, I'd introduce Dr. Francis McManamon, the departmental consulting archaeologist. Frank, would you join me?

Frank is the lead agent for the implementation of this act within the Department.

Mr. McMANAMON. Thank you, Mr. Chairman. It is a pleasure to be here.

We have consistently encouraged both agencies and museums to complete those portions of inventories for their collections where there aren't questions of cultural affiliation or definition or things like that, and to undertake repatriation as soon as possible on those.

I would have to look at the specific section, which I haven't done since you asked the question, but that should not be the reading

of that section, and if it appears to be, we can certainly redouble our efforts to emphasize that that's not the case.

Senator INOUYE. We would appreciate a response on this.

Mr. McMANAMON. We'll be happy to provide it.

[Information provided in Ms. Stevenson's prepared statement which appears in appendix.]

Senator INOUYE. You have indicated that the Department of the Interior is currently considering proposed regulations to implement the civil penalty provisions under section 10 regarding non-compliance with the act. When do you anticipate that these proposed regulations will be published?

Ms. STEVENSON. Section 9 of the statute authorized the Secretary to assess civil penalties. Regulations required to ensure due process have been developed in consultation with the Review Committee. The Department is considering issuing these procedures as an interim rule that would effect immediately to guard against museums avoiding an assessment because the statute of limitations expired.

For example, the Office of the Solicitor has estimated that one civil penalty case from initial investigation to final appeal could cost the Department \$100,000 in staff time and resources, so we're anxious to get these done as quickly as possible.

Senator INOUYE. How will your Department, the Department of the Interior, work with Indians tribes to determine the disposition and treatment of unidentified human remains? Are there any proposals presently under consideration?

Ms. STEVENSON. May I ask Dr. McManamon to answer?

Senator INOUYE. Please.

Mr. McMANAMON. Thank you. The Review Committee, Mr. Chairman, has considered this particular question of how to treat culturally unidentifiable Native American human remains, and they are considering a set of recommendations that they will eventually be making to the Secretary of the Interior about how best to handle the treatment of this particular category of remains.

I think the Review Committee representatives who are here are probably going to talk about this in some more detail.

We have circulated an initial draft of those recommendations, and we received something like 120 written responses to it, which the Review Committee considered at their last meeting in Anchorage. The plan now is for them to consider a second draft of those recommendations and to have further discussions on it at their next meeting.

So the issue is seen as a serious one, one that needs consideration, and those considerations are being taken into account at this time.

Senator INOUYE. I can assure you that the committee is pleased to hear that.

Thank you very much.

Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you very much.

I have two other hearings that are now in progress in other committees, so I am unable to stay for the entire proceedings today.

When I was a Member of the House of Representatives I was involved in the enactment of the legislation that creates the circumstances that brings us to this hearing today. And I felt then and feel now that the circumstances under which both public sector and private sector institutions have warehoused, in effect, human remains and other objects—especially the human remains of Native Americans—in some cases for well over a century, that it really called for a process by which those remains could be given back to the tribes and the tribes could give them the proper respect and burial that they choose to do.

When we got involved in this originally in passing a piece of legislation, we did not feel that this was rocket science, especially when you have institutions that have had these remains for nearly a century, and then we have people say to us, "But we need time to study them." You take a look at a century of warehousing, and you figure if there is any study to have been done, you'd have thought most of that study would be completed and that this could move forward then expeditiously after the law was passed.

There is a substantial amount of frustration that we will hear today from witnesses about the general pace of compliance with this law. Some of it may be that enough resources aren't available. I don't know that. Some of it may just be foot-dragging. Some of it may simply be the bureaucratic system that doesn't move very fast.

But some of the frustration I think is certainly meritorious, from meeting deadlines to making appointments on time, publishing regulations on time.

Tribal Chairperson Jesse Taken Alive, from the Standing Rock Sioux Tribe, will be testifying today, and he's accompanied by Tim Mentz, who is a representative on the NAGPRA Review Board, and I have reviewed Chairman Taken Alive's testimony, and he, I think, will testify to what a lot of others feel about the frustration of this process.

We want to get this moving and do it in the right way. And especially there is going to be frustration expressed about the lack of input by tribes in the development of regulations, and our anticipation in the spirit of this legislation was that we would have full input and cooperation and a spirit of partnership along the way, and I think some of the testimony that you will hear today, Mr. Chairman, will demonstrate that a lot of folks feel that there has not been adequate cooperation.

So this hearing is, I think, a positive step. I think Chairman Taken Alive will probably echo that, as well. This is a positive step forward because we need finally to get these issues resolved.

These issues related to the State Historical Society and Museum in North Dakota that has human remains, the Smithsonian that has human remains. And when I got involved in looking at this I concluded what I think you concluded and many others have—these ought to be returned, and they ought to be returned on an expedited basis in a reasonable way, and I hope this hearing now begins to unsnarl some of the knots that have occurred in the bureaucratic process by which we can finally get that done.

So, Mr. Chairman, thank you very much for holding these hearings. I welcome Chairman Taken Alive and my friend, Mr. Mentz, from the Standing Rocks.

[Prepared statement of Senator Dorgan appears in appendix.]

Senator INOUYE. Thank you very much.

May I now call upon the chairperson of the NAGPRA Review Committee, Ms. Tessie Naranjo.

STATEMENT OF TESSIE NARANJO, CHAIRPERSON, NAGPRA REVIEW COMMITTEE, SANTA CLARA PUEBLO, ESPANOLA, NM

MS. NARANJO. Thank you, Chairman Inouye.

I appreciate the opportunity to offer testimony as a member and chairperson of the National Review Committee for NAGPRA.

The individuals selected in the spring of 1992 to serve as Review Committee members have worked for 4 years, meeting at least twice each year, working on various aspects of NAGPRA, such as refining the regulations which implement the statute. These regulations have just been published in the "Federal Register."

Other activities of the Review Committee include consideration of five dispute cases, oral testimony from 93 individuals during 1992 to 1994, many of whom represented Indians tribes or are of Indians descent.

At our last meeting in Anchorage, AK, October 16-18 of this year, we discussed the 120 written comments received on our draft recommendations regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

We have experienced frustrations over a number of issues. These frustrations and concerns became the recommendations in our 1993/1994 report to Congress, and I'll summarize the recommendations excluding the recommendation that the regulations be approved as soon as possible because they, in fact, have just been published.

No. 1, that Congress clarify the meaning of Indian tribe within NAGPRA in order to permit Native American groups not presently recognized by BIA, the BIA, to repatriate their human remains, funerary objects, sacred objects, or objects of cultural patrimony.

No. 2, that Congress appropriate at least \$10 million for fiscal year 1996 to help Indians tribes, Native Hawaiian organizations, museums, and universities in complying with NAGPRA directives.

No. 3, that Congress take steps to assure that the Smithsonian complies with all NAGPRA requirements.

No. 4, that Congress consider legislation to protect Native American and Native Hawaiian graves located on State or private lands from grave-robbing and other kinds of destruction.

Now I wish to make comments with regard to funding. For fiscal year 1994 and fiscal year 1995, the total number of NAGPRA grants was under \$5 million, and the total request from tribes and museums was \$30 million. The number of grant requests will increase with this coming fiscal year 1996 grant applications. We need increased funding for the grant program.

Increased funding is also needed for the costs involved in "Federal Register" notices due to the increased number of inventory notices of human remains and associated funerary objects.

One of the effects will be the inundation of work related to the documentation of these inventories of human remains by the NAGPRA administrative staff and the Review Committee.

We expect that, as the inventory notices increase, the number of disputes will rise. Disputes always prolong conflicts and involve the time of the limited NAGPRA staff. It also requires more consideration of dispute hearings by the Review Committee.

Additionally, more funding is needed by the NAGPRA staff to implement the civil penalties section currently being reviewed by the Department. This section deals with those individuals and institutions who are in noncompliance. Investigative work is a crucial process in determining noncompliance.

Our recommendation in our 1993/1994 report to Congress was that it appropriate \$10 million in fiscal year 1996 to continue to implement the Native American Graves Protection and Repatriation Act. This amount is absolutely essential if we are to effectively carry out the intent of NAGPRA.

Last, Mr. Chairman, I want to make mention that the Keepers of the Treasures, a national organization promoting cultural preservation of tribes, is in support of the efforts of the NAGPRA staff and the Review Committee and supports our request for \$10 million for fiscal year 1996.

Thank you.

[Prepared statement of Ms. Naranjo appears in appendix.]

Senator INOUYE. I thank you very much, Ms. Naranjo.

May I call upon Senator Campbell. Would you like to make an opening statement?

Senator CAMPBELL. Thank you, Mr. Chairman. I'd just like to ask unanimous consent to introduce a written statement for the record.

Senator INOUYE. Without objection.

[Prepared statement of Senator Campbell appears in appendix.]

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO

Senator CAMPBELL. We've got three bills being marked up in Energy, so I'm only going to stay a few moments, but, as a person who has been vitally interested in that, in fact, even before this legislation was dealt with in 1990, going back to our days when we worked on the Museum of the American Indian bill and modified that language to start a process by which we could return the remains that were housed over at a Smithsonian back to tribal groups that could claim them, I've been just as interested in this as you have and many Indian people in this country.

Certainly, I'm somewhat concerned, too, at the slow progress that Interior has made in implementing NAGPRA, but I guess that part of that's our fault, because in times of budgetary constraints we probably haven't appropriated enough money to let them do the job.

I apologize for not being here to the Indian people that have already testified, and the Park Service, too, but I want to assure you, Mr. Chairman, that I look forward to working with you to try to make sure that this act is completely implemented, and at the earliest convenience.

Thank you.

Senator INOUYE. I thank you very much, and I can assure you that we are singing from the same hymnal.

Ms. Naranjo, as the primary sponsor of this bill, I can assure you that it was the intent of this committee to include all Indian tribes within the scope of the act's protection. I note that the official position of the definition of Native American is just for those federally-recognized. If it requires amendment, I will propose such an amendment.

Ms. Naranjo, do you believe that the human remains, funerary objects, sacred objects, or objects of cultural patrimony of non-federally-recognized tribes should receive the protection of this act?

Ms. NARANJO. I do.

Senator INOUYE. You have made several recommendations. One of them states that the Congress take steps to assure that the Smithsonian Institution complies with all requirements of the act. Are you referring to the National Museum of the American Indian within the Smithsonian, or other museums within the Smithsonian complex?

Ms. NARANJO. The Museum of Natural History is one of the museums that I'm referring to, one of the sections within the Smithsonian Museum that I'm referring to.

Senator INOUYE. You are not referring to the American Indian Museum?

Ms. NARANJO. I am also referring to the American Indian Museum.

Senator INOUYE. Would it be possible for you to supply us with some further detailed information as to how you believe that these institutions are not complying with all the requirements of the act so I can personally call upon them for their responses?

Ms. NARANJO. Mr. Chairman, what I'd like to do is ask Mr. Dan Monroe, also on the Review Committee, to respond to that question.

Senator INOUYE. Fine.

Mr. MONROE. Mr. Chairman, the committee has had some concern regarding this issue, as has the museum community. At the time the act was passed—you may remember we discussed this together—we expected that the Smithsonian would adhere to all the provisions of NAGPRA.

Very briefly, the situation is that the Smithsonian is currently acting under different legislation, and that the Smithsonian has made ample investment and considerable progress, which I think we should note, in carrying out the general intent of NAGPRA.

However, the fact is that the Smithsonian Institutions, the separate museums, are operating under different policies. The Museum of the American Indian is operating under a "more liberal" policy than NAGPRA. The rest of the Smithsonian Institution is operating under somewhat different policies.

First of all, they have not filed inventories with tribes nor do they have to do so. They have not filed summaries, nor do they have to. And the process, very briefly, by which Native American people would interact with the Smithsonian does not mirror NAGPRA in a number of regards.

The committee's point is simply that the Smithsonian is the national museum. We again wish to recognize the very substantial in-

vestment that the Smithsonian has made to comply with the general intent of NAGPRA, but it has been our feeling all along that, as the national museum, it is reasonable that the Smithsonian, either by policy or by congressional action, comply with NAGPRA.

That will require—just my final point—that some steps be taken retroactively because the Smithsonian is not in compliance at this point.

Senator INOUYE. I can assure you at this juncture that you have correctly stated that, at the time of the passage of this act, the Smithsonian Institution prevailed upon the committee not to include the full institution in the act until such time as an overall institutional policy could be developed which might reconcile the differences between provisions addressing repatriation and the Native American Museum and other Smithsonian museums.

We, in the Congress, relied upon the representations of the Smithsonian at that time that recommendations for special legislation closely paralleling the provisions of the NAGPRA would be forthcoming.

I am certain you will recall that at that time other museums and scientific institutions across the country were adamantly opposed to the exclusion of the Smithsonian—"Why pick on us?"—and that the museums and scientific institutions agreed to accept the exclusion only on the condition that special legislation would subsequently be enacted by the Congress.

I agree with you that, in this critically important policy area, the law should be applied evenly and without exception. So, accordingly, I will be calling upon the Secretary of the Institution to work with the committee to develop such legislation that we promised that would apply specifically to the Smithsonian and which would extend the coverage to that institution, so I give you my pledge on that, sir.

Mr. MONROE. Thank you.

Senator INOUYE. Ms. Naranjo, I am certain you recall that in my opening remarks I cited certain rulings of the recent decision in the Federal district court in Hawaii, and I would like to ask some of the questions that I asked Ms. Stevenson.

Do you believe it would be helpful or advisable for the Congress to amend this act to authorize legal actions to be initiated by those who may qualify to stand in a guardianship capacity for human remains so that Native American human remains are not desecrated?

Ms. NARANJO. Yes.

Senator INOUYE. Do you believe that information about Native American human remains should be exempted from public disclosure under the Freedom of Information Act? I have asked this because concern has been expressed by several tribal leaders that these remains should not be further desecrated, and that is why I am asking you this question. Or would you like to think about this?

Ms. NARANJO. Thank you.

Senator INOUYE. Do you believe that there was adequate consultation with Indian tribes during the development of the final regulations to implement the act?

Ms. NARANJO. Mr. Chairman, I do. I do because we have had at least 10 meetings now in the past 4 years, and what we have tried to do, as Review Committee members, is to go to as many tribal

communities as we could. That's one example of our trying to reach out to all the tribal communities, understanding and respecting that tribal people do not always have the funds to travel. Most recently, we were in Anchorage, Alaska, area for that reason.

Also, as we had drafts of the regulations, they were published in the "Federal Register," and there was that opportunity for tribal people to respond to the regulations.

Also, during our Review Committee meetings, there were a number of testimonies, and we purposely afforded time for tribal people to take that opportunity to provide testimony on different matters.

So yes, I do, Mr. Chairman.

Senator INOUYE. Was your committee involved with the development of the criteria for time extensions during the inventory process?

Ms. NARANJO. No; we were not.

Senator INOUYE. Are you satisfied with the time extensions?

Ms. NARANJO. Mr. Chairman, I know that we're still in discussion on that. So, as far as the deadline is concerned, I think there needs to be some sort of reasonable deadline. For example, if a particular museum asks for 27 years, that's outrageous, as far as I can tell.

Senator INOUYE. Well, I thank you very much.

I would like to advise the witnesses that the committee will be submitting additional questions. Some are very technical, so we'd like to give you some time to review them and respond to them.

Now may I call upon Mr. Monroe, a member of the NAGPRA Review Committee.

Mr. MONROE. Mr. Chairman, it is a privilege to testify here.

Senator INOUYE. Excuse me.

Mr. MONROE. Yes.

Senator INOUYE. Senator Campbell, did you have any questions?

Senator CAMPBELL. Mr. Chairman, no, I don't have any questions, but I guess maybe to Ms. Naranjo, in particular, I'd just like to pose a rhetorical comment, I guess.

We get so bogged down in these committees about policy and legal action and authorizing legislation and regulation and how to implement it and reviewing things that I often wonder what the heck ever happened to sensitivity and fairness?

I don't think there is a person in this country that wouldn't understand what Indian people went through if it was their grandmothers or their grandfathers when you're talking about it. But somehow, when it's not Indian grandmothers or grandfathers, we get all bogged down in this, frankly, long-winded, rhetorical debate.

I'm convinced that if agencies were really interested in getting something done, they would be up here pushing us as hard as a Indian people are pushing us, and we deserve to be pushed.

I thought I'd just throw that out to let you know, Ms. Naranjo, that some of us are just as disturbed as you are about the lack of emphasis on this within the agencies, and the lack of it being a priority issue to them, too.

I want you to not leave here without knowing that Senator Inouye, and I'm sure Senator McCain and most of the people on this committee, including me, are interested in trying to move the process forward at all speed.

Ms. NARANJO. Thank you for that comment.

Senator INOUYE. I can assure you that Senator Campbell speaks for the committee.

I recall, when we first initiated discussions on this matter nearly a decade ago, I made an observation that if the skulls and human remains in custody of the Smithsonian were Irish skulls or French skulls or Chinese Skulls, you would have had an avalanche of criticism and concern and objection. But all these years thousands have somehow been kept in little green boxes there and they are still there.

Senator CAMPBELL. Mr. Chairman, if I might interject, that's exactly the problem. With everybody else in this country we talk about human remains and understand the reaction, but when you talk about Indians, they somehow become artifacts.

Senator INOUYE. Yes.

Senator CAMPBELL. They make a transition, like old pots and baskets in a glass case instead of the human tragedy that has gone along with how they were collected in the first place.

Thank you.

Senator INOUYE. We do not see any human remains of pilgrims in museums, or funerary objects, or sacred objects of pilgrims in museums, but we find many Native American. So we agree with you, and we, too, are rather frustrated, but we are here in an institution that's concerned about laws, and we would like to make certain that when we do establish this it will be established in such a manner that in future generations no one will be able to challenge or question the intent of Congress or the intent of this Nation when we established this law.

So, even with even with the frustrations, we are willing to hang on for a little while longer. But, as Senator Campbell has very eloquently indicated, there is a limit.

Mr. Monroe, please proceed.

STATEMENT OF DAN MONROE, NAGPRA REVIEW COMMITTEE, PEABODY ESSEX MUSEUM, SALEM, MA

Mr. MONROE. Mr. Chairman, members of the committee, I'm Dan Monroe, director of the Peabody Essex Museum in Salem, Massachusetts, member of the Review Committee, and immediate past president of the American Association of Museums.

While I think all of us feel frustration at a variety of things involving implementation of this act, I'd like to take the opportunity to point out that a substantial amount of progress has been made and that, on the whole, we have seen both tribes and museums acting to implement this act in good faith and good spirit.

I think that the ruling in Hawaii is disturbing on a number of counts, and I'm sure the Review Committee would appreciate the opportunity to respond specifically.

I'd like to just comment very briefly, and then I'd be happy to answer questions.

No. 1, pointing out that the actions that have been taken to date for implementation have, in fact, resulted in a number of repatriations and that we hear in testimony around the country that this has been extremely beneficial to Native American people in terms

of restoring a sense of individual and tribal, cultural, and religious integrity.

It has also been helpful, where sacred objects have been returned, to the continuation or restoration of Native American religious practices.

And a final benefit that I would like to point out is that there have been established many instances of partnership, new partnership between museums and Native American tribes and people that have been very useful to understanding collections and also to be able to present an accurate and fairer picture of the Native American experience in this Nation.

I'd like to comment very briefly on the issue of promulgation of regulations. There is frustration on two sides: No. 1, that there wasn't enough input, and No. 2, that it has taken 5 years to get any regulations out.

The committee has made it clear that we feel that it is critically important there be ample involvement and input from all parties. It is also important that these regulations move forward in a timely manner, and we'd just like to say at this point that we'd like to see the remaining sections acted upon in a timely manner.

I would just second the point that Ms. Naranjo made that we have heard a great deal of testimony, and at some point you have to draw the line and move forward.

The issue of financial assistance I want to spend a little bit of time on, and I want to formally correct my written testimony, which is erroneous and you have my apology for that.

Part of the reason that it has been difficult to implement this act is that it is very costly. The original estimates were \$40 million. I can tell you that those estimates are just flat-out wrong, not including Federal agencies, and that tribes and museums neither are in a position to support costs that are easily well over \$50 million, and that's very conservative.

I just want to end by saying that the request—and you're going to hear it again—for \$10 million a year is not out of line. We understand the Department of the Interior's position on this, but the committee has made it clear in the past and we'd like to make it clear again that \$2 million a year is not sufficient for either tribes or museums, particularly now that inventories have been filed and there needs to be much more dialog.

Tribes are, as you know, getting cut very hard on the funding that they are receiving, and they are already in difficult straits financially, so I just want to underscore that the issue of Federal support, which has been, at best, less than 5 percent of the total cost here, is an issue for successful implementation in the future.

The committee has dealt with this issue of definition of tribe. I just want to go on the record—and we've done it in our written testimony—that we've urged the Secretary of the Interior to take a more liberal definition that would recognize State tribes. Museums can't make decisions about who tribes are, but certainly it's possible, we believe, to broaden that definition, and we'd like to see that done one way or the other.

There are many tribes who are not federally-recognized. I believe there are 45 seeking Federal recognition right now, many of which had recognition in the past.

We discussed the issue of the Smithsonian Institution, and I won't touch on that.

The remaining issue the committee faces, in addition to working with the Secretary to get the remaining regulations out in a timely manner, is the question of unidentified remains. It is a difficult and, frankly, contentious issue. We're working diligently on it, and we've received a great deal of testimony. I'm sure that you will be hearing more about this matter in the future.

I would just like to close by recognizing another point with respect to the Department of the Interior. The leadership that Dr. McManamon and his small staff have exercised here, while it's a tough job, I think warrants recognition. They've done a good job moving this along within the context of a very big bureaucracy that frustrates all of us.

I'd just like to close by saying two things, again. While there are many issues and problems and concerns regarding this act—and you've heard some, and you'll hear some more—I think we should keep in mind that we're making advance, and that the relationship between Native Americans and museums, universities, and Federal agencies today is very different than it was 5 years ago.

I'd like to personally credit Senator Inouye with the leadership you exercised in bringing this about, as well as others.

Finally, I'd conclude by saying that the financial issue here—and you hear this constantly, but we're just telling you the truth—is a major factor, and the current amount of money budgeted in the Department of the Interior for grants is simply not sufficient.

Thank you.

[Prepared statement of Mr. Monroe appears in appendix.]

Senator INOUYE. Thank you, Mr. Monroe.

Then would you suggest that the \$10 million that your Review Committee is recommending is not sufficient either?

Mr. MONROE. We believe that the \$10 million is necessary we understand the budget climate, we understand the need to balance the budget. We also feel strongly that there is a moral responsibility here, and that we would be happy to see this amount increased to \$10 million. It would be great if it were more, but \$10 million is a very reasonable request.

Again, museums have borne a substantial burden, as is rightly the case and as it should be, and have carried this out in good faith. Tribes now need money to travel, to do the consultation, and museums need to work with them to do that.

It can't be done effectively with the amount of money available, so \$10 million would be very, very helpful.

Senator INOUYE. Ms. Naranjo and you have both testified as to the problems associated with the disposition of unidentified and unclaimed human remains and funerary objects. It might be well if I review for you very briefly one of the reasons why I got so deeply involved in this.

When I became chairman of the committee, one of the first things that I learned was that in the custody of the Smithsonian Institution were 14,500 skulls and human remains of Native Americans, Indians, plus 4,000 human remains of Alaska Natives and Aleuts. Unfortunately, most of them were not collected by professionals—archaeologists and such—but most of them were collected

by soldiers who were operating under the direction of the Army surgeon general, who requested that skulls be sent to him so that he could conduct studies on the cranial capacity of Native Americans to determine their intelligence.

Well, the soldiers got very enthusiastic about it, and they began collecting and digging up graves all over the countryside, and the only thing we know is that they came from the corridor area, or they came from the Oklahoma area. We have no association with specific tribes or specific areas, just a large area.

Now, having cited that, and then the case that has just concluded in Hawaii, I presume you would favor an amendment that would authorize a guardianship capacity for appropriate entities so that we could provide protection for these remains.

Mr. MONROE. The Review Committee has taken a number of approaches, and we did not have any information on the Hawaii case. I think that it is fair to state—and Tessie, you could add—that there is great concern about the issue of unidentified remains. It is very important to try to figure out some mechanisms—not over the next 5 years, but in a reasonable time—by which remains can be returned.

And I think it's also fair to state that the issue of ancient remains is a contentious one.

We would like to see—and I think I can speak for the museum community, as well—returns of Native American remains that ought to be returned, returned expeditiously. We're working to achieve that. The general principles you're talking about Senator are not in disagreement with the museum community. It's just that it's a difficult issue.

We don't, for example, wish to see remains returned to the wrong parties. There are groups like those in South and North Dakota with the Sioux, from whom you'll hear with later, that have joined together to help facilitate return of a number of remains where it may not be possible to determine whether they were precisely Oglala Sioux or Brule, but rather clearly there are Sioux and they should be returned.

I'm confident that we'll address these issues working on them.

Senator INOUYE. I asked a question about the exemption from public disclosure under the Freedom of Information Act. Do you think that information about Native American human remains should be kept secret?

Mr. MONROE. Well, there are a number of concerns that the committee has discussed with respect to this. Again, we're taken aback, I think, by the rulings in Hawaii a number of ways.

There are concerns in making information public about Native American human remains because, if you do then you're just basically publicly advertising where it may be possible for pot hunters and grave diggers to disturb more remains. That's clearly a major concern.

Second, there is obviously—and as there should be—a great deal of sensitivity about additional scientific study and about certain kinds of information being broadly disseminated.

The committee can't respond to the Hawaii case because we didn't know about it, but I think it's fair to say that it's a concern to us that information about the location of gravesites would be

available to anyone who wants it. It certainly goes against some of the basic tenets of this law.

Senator INOUYE. As to your other concern of including all Indian tribes, whether they are recognized by BIA or not, I can assure you we concur with that, because we know that most of the tribes that have not received Federal recognition are found in California at this time, and these tribes were recognized at one time. They entered into treaties with the United States, but we decided to disregard these treaties and therefore made them unrecognized, so we would try to correct history, if we can.

Mr. MONROE. Thank you very much. We'd appreciate it. I know the Review Committee would appreciate that, and certainly those unrecognized tribes with whom we've dealt would deeply appreciate it.

Senator INOUYE. Because I think that we have the authority, Congress does have the authority, and that we should clearly enact a statute to provide authority for repatriation of all human remains.

Once again, I would like to say that, as Senator Dorgan and Senator Campbell have indicated, they have had 200 years to study and make scientific inquiry about these skeletal remains. Maybe the time has come. I do not think they need 200 more years to do that.

Mr. Monroe, you also somehow expressed that you were not too happy with the publication of the final regulations in the "Federal Register." Are you supportive or critical? I could not quite get it.

Mr. MONROE. I'll be clear. The Review Committee has been concerned at the extended time it has taken to publish regulations.

We know that by not having regulations published in 5 years, almost to the day, after this act was passed, it has caused confusion, unnecessary expense, and it has made it more difficult, on the part of both tribes, museums, and universities and Federal agencies.

We would have been happier to have seen regulation passed expeditiously. We think, just to wrap it up, that there ought to be ample opportunity, and we've done that within the resources available to the committee and to the particular department under Frank McManamon, to make it possible for as many people as we can, representing everyone affected, to participate in and provide input to regulations, on the one hand.

On the other hand, we think that it is important and reasonable that to get this work done in a more timely manner. That was my point.

Senator INOUYE. Before I call upon Senator Campbell for questions, I would like to thank all of you on the committee for the many hours and many days of time you have spent, and for the contributions you have made toward implementation of this act.

I can imagine the frustration that you have experienced, but I hope that among the frustrations is not the feeling that you have no support here. I can assure you that you have a lot of support here. We are just waiting for our marching orders. That is all. And when we get them we will proceed.

Once again, I would like to request from you your views on this recent Federal district court of Hawaii decision, because it will impact upon your work, and if you believe that some of these provi-

sions should be clarified or cured by legislation, if you would tell us so we'd be very happy to act upon it.

Senator Campbell.

Senator CAMPBELL. Thank you, Mr. Chairman.

Mr. Monroe, are you a veteran, by any chance?

Mr. MONROE. No.

Senator CAMPBELL. Well, Senator Inouye, as you know, is a veteran, as I am. Senator Inouye is a very highly-decorated World War II veteran, and I was in the one after that in Korea.

Let me just put this in a context maybe that any veteran in this room could understand.

If you combine all of the people who are not accounted for, Americans of World War II, of Korea, and Vietnam, there are about 50,000. There are about 40,000 from World War II, roughly 8,000 from Korean, and about 2,000 from Vietnam.

Although the World War II veterans and the Korean veterans haven't been quite as vocal, I know that if you follow the newspapers you know that the Vietnam veterans have been very vocal and the families have been very vocal across this Nation about returning the remains of those 2,000 missing. So we have a total of about 50,000.

According to CBO, the number of skeletal remains that haven't been returned to Indians may number 200,000, maybe four times the amount of all American missing in all the wars since World War II.

I want to just put that in a sort of balance so you may be able to understand the magnitude of what it means to American Indians. Certainly those remains are just as important to them as any American's missing remains are of their loved ones in any of those wars.

You talked about the Native American experience. It is a very proud, dignified, courageous experience in the history of this country. But I often think sometimes if we could have more department heads go out and live that Native American experience, on-reservation experience, they'd understand, I think, better what Indian people feel they are up against, because it is also an experience of poverty, of sometimes as much as 70 or 80 percent unemployment, of sickness, of lack of sanitation or good housing, of living on commodities, of all kinds of social problems.

If you magnify by five every problem that America has, magnify it by five and you have part of the Native American experience on a daily basis.

One of the few things they really hang on to is traditions, culture, and the knowledge and belief that the spirit of the old ones, the spirit of their ancestors are still with them to help guide them through troubled times.

I don't know of any culture that puts more emphasis on that, more belief that they're being guided and helped by the ancient ones than American Indians.

It seems to be a cultural experience for most Americans, when your parents die or your grandparents die, you go out there once a year and you put flowers on a grave and you remember them once a week or once a month or something in your prayers, and little by little they sort of fade out of your memory, but that's not the

Native American experience. They think about it all the time. They just absolutely think about it all the time.

People that we would call "traditionals," they include it in their prayers daily. Daily in the morning, before they do anything else, they include it in their prayers.

But I wanted to just point that out that sometimes when we talk about other experiences in America we're on different wavelengths. We try to apply the logic of living in a certain kind of a lifestyle to what the Native American experience might be, based on a couple of friends we've seen or something we read or a movie we saw or something of that nature.

But it is really a driving force, this concern about elders and ancient ones and the people that they believe the remains should go back to the earth or be returned.

But I wanted to point that out to you, just to sort of put it in kind of a context about all of the rhetoric, all the debate, all the dialogue, all the anger we're getting on the missing servicemen and how it pales by virtual numbers with what Indians go through.

Mr. MONROE. Senator, I appreciate that point, and if you will note in my written testimony, I made precisely the point you just made with respect to Vietnam veterans.

I'd just add one other thing, I also pointed out in my written testimony: This country has a moral responsibility to address this issue and that this small amount of money, while it has been very deeply appreciated, that has been invested so far on the part of the Federal Government needs to be increased for the very reasons that you just pointed out.

Senator CAMPBELL. And I appreciate the fact. I know there has been some progress made, probably more in the last 8 or 10 years, or at least since the Smithsonian bill passed, and probably the last three or four decades before that, so I don't mean to imply that nothing's being done.

Mr. MONROE. I understand.

Senator CAMPBELL. I just get frustrated that we're not moving as fast as we ought to, but thank you.

Mr. MONROE. I understand your point.

Senator CAMPBELL. Thank you, Mr. Chairman.

Senator INOUYE. Thank you very much.

I would like to thank the panel: Ms. Stevenson, Ms. Naranjo, Mr. Monroe, thank you very much.

Mr. MONROE. Thank you.

Senator INOUYE. Before calling upon the last panel, I would like to advise all of you that this committee has requested information from the Department of Justice on the status of implementation of section 4 of the act, which provides for criminal penalties for violations of the act and for illegal trafficking of sacred objects. That has been a major problem in this area, and I can assure you that the written response we will receive from the department will be made part of the record so that all of us will be able to study that.

Now may I call upon the next panel: The Lieutenant Governor of the Gila River Indian Community, Cecil Antone; the chairwoman of the Pawnee Tribe of Oklahoma, Elizabeth Blackowl, accompanied by the chief attorney of the Native American Rights Fund, Walter Echohawk; the chairman of the Standing Rock Sioux Tribe

of North Dakota, Jesse Taken Alive, who is accompanied by the NAGPRA representative of Standing Rock, Tim Mentz; and the chairman of the American Association of Museums and president and chief executive officer of the Milwaukee Public Museum, William Moynihan.

May I now call upon Governor Antone.

**STATEMENT OF CECIL F. ANTONE, LIEUTENANT GOVERNOR,
GILA RIVER INDIAN COMMUNITY, SACATON, AZ**

Mr. ANTONE. Thank you, Mr. Chairman.

It's good to be here again. We testified before on legislation that was approved in 1990.

At the outset, I would like to say basically that, in our situation with NAGPRA and the implementation, we have not done a lot in this particular legislation because, as you stated before, there are a lot of problems as far as the regulations, and the previous speakers have spoken to that, and the amount of resources.

What I want to at least say today is that, regarding my testimony, is our experience in Arizona, as far as our four tribes and the efforts we've done with Arizona law, because I think it has a lot to say because Arizona law was approved the same time NAGPRA was approved, in December 1990.

I know that Senator McCain had a lot of inquiries about the law in Arizona, because at the time the committee was looking at the passage of NAGPRA.

Basically, the inquiries that we've received over the last 4 years has been in excess of 150 letters, and we have responded to those letters indicating our interest in trying to at least make visitations to these locations.

I know in my testimony I did not make mention, but we did receive part of the NAGPRA grants, and that was between Gila River and Salt River, and so part of those resources are going to be toward visiting these institutions—not all of them, but maybe one or two that has the highest concentration of our people.

The other thing is that we, as—often people in our location with the other four tribes have had a lot to do as far as putting the State law into place, because we felt at that time that there had to be at least some cohesiveness among tribes, particularly if they are all related.

When I testified back in 1990, I believe, before NAGPRA was approved, we had put together a repatriation policy and it's still in place, and we have done a lot as far as implementing that policy, both to Federal agencies and to State law.

I guess our experience, at least with NAGPRA, has been very limited, as I stated, and it has only been with programmatic agreements we've done recently with the Air Force, and soon to do with some private entities, as well, because of the location of the mining facility close to our reservation.

In essence, we have, as far as the State laws, we've repatriated over 3,000 human remains of our people and funerary objects.

The biggest difficulty, as my testimony states, is the lack of resources, and so what we're doing is developing partnerships with the Federal agency to develop a repository there at Gila River to house all the big irrigation project in Arizona called "the central

Arizona project," and we've made an agreement with the Bureau of Reclamation to house and develop or construct a repository in our community. And we will also be using our own resources to supplement that, because we obviously want to repatriate a lot of the cultural patrimony items from other institutions in the country dealing with NAGPRA and house these in our community.

For instance, recently, this past July, I visited the National Museum of the American Indian and viewed two of the only four in existence Pima blankets made of 100 percent cotton in that institution, and we want to at least try to get some of those blankets back to Gila River in review for our people, for our younger people.

But, in essence, that's basically my testimony. I appreciate the effort that you have done, Senator, and Senator McCain, and all the committee improving NAGPRA, even though it is a start and there has been some delay. Five years has been a long time. I recognize the bureaucracy that everyone has to go through, but I didn't really want to say anything against the National Park Service or the Review Committee. I think they've done a job required of them, and with a lack of resources, and I applaud the committee for at least looking into providing additional moneys to Indian tribes to fully implement this law.

Thank you.

[Prepared statement of Mr. Antone appears in appendix.]

Senator INOUYE. I thank you very much, Governor.

You mentioned in your testimony that an agreement was reached between your tribe and the Bureau of Reclamation—

Mr. ANTONE. Yes.

Senator INOUYE. [continuing]. To construct a repository to house archaeological material. How did you reach this agreement?

Mr. ANTONE. Well, initially this was one of my ultimate goals when I got into office, to develop some type of museum and repository for our tribe. Right now, as you may or may not be aware, we do have an agreement with the Bureau of Reclamation to receive water, one of the largest allocations under that law, 172,000 acre feet.

In part of the process of that, they are going to be doing archaeological work in the community developing for the distribution canals, and so forth.

Obviously, they are going to have to go through the NEPA process, and one of the things they are going to do is archaeological work, and so, rather than house all the material from Gila River and put them into Tucson, where the Western Archaeological Advisory Conservancy offices or institutions where they are housed now, we thought, "Well, why don't we build it in Gila River and develop a partnership with Reclamation?"

So we instituted that about 1½ years ago, and so tentatively we have an agreement with that.

Also, we're one of the self-governance tribes, and we have included that in the recent AFA agreement with the Bureau of Reclamation.

Senator INOUYE. It will be just to house archaeological remains of Gila River?

Mr. ANTONE. No; it will be all CAP since day one when they started from the Colorado River all the way to Tucson.

Senator INOUYE. You mentioned that the lack of final regulations affected your repatriation efforts. How did it affect it? Slowed it down?

Mr. ANTONE. It slowed it down to the extent that, rather than dealing with the regulations, since they weren't there, we just developed agreements with Federal agencies. In that one case I mentioned about the Williams Air Force Base, a huge archaeological site, we developed an agreement based on some of the provisions in NAGPRA, dealing at least with consultation when they start working on their base, and as far as development, that they need to consult the tribe.

I'd be more than happy to provide you a copy of that programmatic agreement. In this case, it worked out very well.

Senator INOUYE. You worked with the Keepers of the Treasures; is that correct?

Mr. ANTONE. Not today, as of today. I was the first board member, I was the chairman of the board when it first came into existence.

Senator INOUYE. But in your work with the Keepers, could you describe any barriers or impediments in the repatriation process from that standpoint?

Mr. ANTONE. The essence of Keepers is to promote cultural awareness and language and retention of language and cultural retention for Indian people. In my experience with Keepers, there were several things going on.

As you know, in 1992 also the amendments to the National Historic Preservation Act were approved, and also the NAGPRA was approved in 1990, and really I did not foresee any problems. I think the Agency and Park Service were trying to deal with the issues but, as stated before, the lack of resources.

I guess I have to say, as far as regulations, the 1992 amendments of the National Historic Preservation Act, even though they have some draft agreements right now or regulations, they are a little bit better, quicker done—I guess that's what I'm saying—than the NAGPRA regulations.

The Park Service has gone out and had several meetings with the tribes on the National Historic Preservation Act, and what I'm meaning is that that particular legislation which was approved in 1992 has been addressed a little bit more considerably as far as NAGPRA regulations.

Senator INOUYE. I will be asking all of the witnesses, as I did in the first panel, to submit to us in writing your views on the recent Hawaii case, which would have an impact upon your efforts.

For example, I'd like to know what you think about exempting information on Native American human remains from public disclosure. I'd like to know what your position would be on the appointment of guardians so that all of these human remains might be protected, and whether this act should be amended to make certain that Native American human remains have a legal standing in court, because under the ruling of the court, it does not have legal standing, and this would cause, I would say, major concern in this community because of the uncertainty involved.

So I will be asking all of you to, if you will, share with us your thoughts on this.

I'd like to now call upon—

Mr. ANTONE. Senator?

Senator INOUYE. Yes.

Mr. ANTONE. Could I just add one comment to what you mentioned earlier about unidentified human remains?

Senator INOUYE. Yes.

Mr. ANTONE. I guess in our situation, Arizona law, in that law basically it says that the closest tribe where the human remains were uncovered, that tribe would be the tribe to repatriate those human remains, if they desire.

There have been cases in Arizona where that has occurred, because ultimately the purpose of repatriation is to bring back the ancestors and rebury them, no matter where they are at. Even though they are not identified, they are human beings. They were human beings.

And so in our situation we've always, even though they were unidentified and we didn't know what tribe they came from, we took them in and reburied them because they deserved that.

Thank you.

Senator INOUYE. Thank you very much.

May I now call upon the chairwoman of the Pawnee Tribe, Elizabeth Blackowl.

**STATEMENT OF ELIZABETH BLACKOWL, CHAIRWOMAN,
PAWNEE TRIBE OF OKLAHOMA, PAWNEE, OK, ACCOMPANIED
BY ROBERT PEREGOY, ESQUIRE, ATTORNEY AT LAW, NATIVE
AMERICAN RIGHTS FUND, WASHINGTON, DC**

Mrs. BLACKOWL. Good morning, Vice Chairman Inouye and members of the committee. I am Elizabeth Blackowl, president of the Pawnee Tribe of Oklahoma. Thank you for the opportunity to testify on behalf of the Pawnee Tribe about our efforts to implement Federal repatriation laws.

I will summarize my written testimony.

Mr. Vice Chairman, the Pawnee Tribe commends you and Chairman McCain and other members of the committee for your dedicated leadership in passing NAGPRA. It is difficult to express in words our heartfelt sentiments involved in repatriating our beloved ancestors.

For example, we were deeply moved by Senator McCain's presence at the Fort McNair ceremonies held last June. We were honored to have him with us when the remains of six Pawnee scouts and U.S. Army veterans were repatriated from the Museum of Natural History. Our tribal representatives were very touched by the good words that he shared with us on that day.

With you, Senator Inouye, we appreciate your continued leadership and support in our repatriation efforts, and we appreciate your sponsorship of this law.

I am here to testify that NAGPRA can work. Since 1989, our tribe has repatriated and reburied 1,100 relatives from Federal and State museums. This was accomplished in four ceremonies, beginning in 1990. Three of these burials occurred under Nebraska and Kansas repatriation laws. The fourth reburial was done in 1995 under Federal law, NAGPRA, and the National Museum of the

American Indian Act. We reburied 400 ancestors and their burial objects.

These dead were repatriated from four State and Federal museums. They were reburied with tribal rights and with military honor for the U.S. Army veterans.

The Pawnee Tribe currently has a repatriation claim pending with the Museum of Natural History. This claim was initiated in 1988. A part of this 7-year claim is still pending at the Smithsonian. It is part of an appeal recently decided by the Native American Review Committee of the Smithsonian Institution. This was the first appeal decided by that committee, and we commend the Review Committee for their fair and timely way the handled our appeal.

We started to see results under NAGPRA, but improvement is really needed. Our experience tells us that there are three specific issues that must be addressed.

First, Federal repatriation budgets are drastically under-funded. The 1995 repatriation cost \$80,000, although we did receive a \$7,500 grant from the Forest Service. In fiscal year 1994 and 1995, the National Park Service received 337 proposals from tribes and museums, totaling \$30 million, but was only able to fund 83 grants for \$4.3 million. This is a \$25 million gap. The current level of \$2.3 million is clearly inadequate.

Congress needs to appropriate at least \$10 million annually to implement NAGPRA in a meaningful way. Let us not forget that we are talking about the reburial of our ancestors.

Second, our repatriation claim at the Museum of Natural History was delayed and burdened with unnecessary Government studies. These studies were unrelated to the Pawnee claims. This resulted in excessive and unnecessary cost to the tribe and to the Federal Government.

To remedy this problem, we recommend that the committee direct the Smithsonian and other affected museums to: No. 1, refrain from excessive delays in corresponding with Indian tribes; No. 2, refrain from conducting unnecessarily and unduly expensive new studies, especially under the guise of documenting or inventorying the remains at issue; and, No. 3, to consult with Indian tribes to make the process less technical and expensive and to streamline claims.

Third, the failure of the Secretary of the Interior to finalize NAGPRA regulations until this week has caused problems. This included delays and increased cost to the Pawnee Tribe in our claim at the Nebraska State Historical Society. Because these overdue regulations were just recently published, the hearing record should be kept open so tribes can comment on these regulations.

Mr. Chairman, this concludes my testimony. On behalf of the Pawnee people, we thank you and your committee for your leadership in this important human rights issue, and the Pawnee Tribe is willing to assist the committee in any way possible.

Thank you.

[Prepared statement of Ms. Blackowl appears in appendix.]

Senator INOUYE. Thank you very much.

I would like to first note that Walter Echohawk is not here and that Mr. Robert Peregoy is with you.

I would like to also congratulate you on the successful repatriation of your Pawnee scouts. Could you tell us how long that process took?

Mr. BLACKOWL. I'll have to refer that question to Mr. Perego.

Mr. PEREGOY. The repatriation process with the National Museum of Natural History took approximately 3 years, as far as I can tell, Senator Inouye, and was quite costly. It cost the Pawnee Tribe and the Native American Rights Fund about \$51,000.

Senator INOUYE. Did you say \$51,000?

Mr. PEREGOY. Yes; \$51,000. That includes other repatriations that were done with the Federal Government under NAGPRA, because problems with excessive delay, as well as what we consider to be very unnecessary studies that were conducted by the Museum of Natural History were really unrelated to the Pawnee claims at issue. That's one of the serious areas of attention that we feel is required, that the museums are conducting studies that aren't called for under the act, under the guise of inventorying and documenting remains where the act, on its face, states that the cultural affiliation is to be determined based upon existing information.

Senator INOUYE. At the beginning of the process, was there any question as to the identification of the four Pawnee scouts?

Mr. PEREGOY. I am not aware of the specifics if there was an issue in terms of the identification of those six Pawnee scouts, but with the one repatriation that was handled this year under NAGPRA with the Federal Government, there was a question at the beginning.

The Museum of Natural History had responded initially to the Pawnee's claim that they only had the remains of two Pawnees, and at that time we knew that there was a substantial more number than that, and so Native American Rights Fund, in conjunction with the Pawnee Tribe, found it necessary to hire additional experts and historians to document our claim at that time.

We documented that there were 80 Pawnees held by that museum, and had we taken the museum's number up front, we would have left 78 of the tribal ancestors of the Pawnee people on the shelves in those warehouses, and it cost us approximately, as I said, \$50,000 to go through that process to do this kind of documentation.

Senator INOUYE. So finally how many remains have you received?

Mr. PEREGOY. Under NAGPRA, 400 from State and Federal museums, and a total—the Pawnee Tribe, over the course of the last 6 years, has repatriated 1,100 ancestors and reburied them.

I think it is very significant to note, Senator, that the present-day Pawnee Tribe consists of 2,500 people, and 1,100 of that 2,500 is about 44 or 45 percent, so that is a very significant number. That's almost one-half of the living Pawnee people today who have been repatriated from these museum shelves and reburied, and that is a very significant number.

If you extrapolated that to the United States population, that would be approximately 120 million people in museum shelves. It is very significant to the Pawnee society, and that's one thing that, frankly, irks NARF and the Pawnee Tribe, and I think that you

and Senator Campbell were very eloquent about it this morning, that there is just not an appreciation.

When we're talking about appropriations here, that is a key issue that the majority of the Members of Congress do not understand that we are talking about significant spiritual matters, and that basically that this Nation goes to great extent and lengths to protect and repatriate its dead, but when we're talking in this instance about the first Americans putting their ancestors and spirits to rest, there just does not seem to be that kind of priority on it.

I think it needs to be elevated to the human level, because in the case of the Pawnee Tribe, throughout this entire process that was very acrimonious, with different State agencies involved, it is very, very true that the living Pawnee people felt collectively a tribal spiritual sickness because of the mistreatment of their dead, and when the people were finally laid to rest, there was a great spiritual healing among those people.

You all identified the numbers today of 200,000 remains out there. That kind of spiritual sickness and pain continues to be inflicted and plagued upon the Indian people of this country, and Congress should certainly see fit to look, when we're looking at trillion dollar budgets—yes, we're in a budget-cutting mode, but when we're talking about \$10 million annually—and that is basically a conservative number—that Congress should see fit to prioritize this right now and say,

Look, it's finally time to let these people be put to rest and let the spirits be restful and not wandering around aimlessly and to heal up those living relatives of the people that are here today and to put the money up and finally do it and get it over with.

Senator INOUYE. In your estimation, how many more identifiable Pawnees are still on museum shelves?

Mr. PEREGOY. That's a difficult question to answer at this time. We do know for a fact that there are probably between 100 and 200 remaining in Nebraska museums that we have not been able to—we don't have the money, haven't had the money to come up to identify them, but based upon information provided by Nebraska museums, they are probably, we think, another couple hundred.

Senator INOUYE. I thank you very much.

May I now call upon the chairman of the Standing Rock Sioux Tribe, the Jesse Taken Alive, accompanied by Tim Mentz.

STATEMENT OF JESSE TAKEN ALIVE, CHAIRMAN, STANDING ROCK SIOUX TRIBE, FORT YATES, ND, ACCOMPANIED BY TIM MENTZ, NAGPRA REPRESENTATIVE, STANDING ROCK SIOUX TRIBE

Mr. TAKEN ALIVE. Thank you very much, Mr. Inouye.

[Remarks in Native tongue.]

Mr. TAKEN ALIVE. I want to begin by saying thank you, as well, to those individuals who have actually repatriated, who have actually reburied, who have stood there in the cold winter winds of North and South Dakota and reburied our ancestors. I want to publicly thank them for the record for their tears and pain that they endured for us so we can be here today and petition for more enhancement of this process, because it is one that is painful and one that is causing a lot of harm to our people.

Senator you have asked everybody since I've been in the room for their input and their comments on important and sacred issue that you began with your comments this morning, something that happened to your people in Hawaii. I will offer this for the time being, and we will followup with more as we discuss it at home.

I think the question needs to be asked of those people who took these artifacts, those people who were involved in this issue for you in your home country in Hawaii. Were they stolen? If they were stolen, why were they stolen? What was the purpose of stealing from us?

We also need to share with them that the guardianship capacity isn't us guarding the remains. It's not us guarding artifacts. It's the spirit of those artifacts, it's the spirit of those remains that guard us. That is our interpretation of guardianship capacity. We're not guarding them, they're guarding us. They're with us.

As indigenous people it is in our heart and our blood to believe, not to know, not to contemplate, not to rationalize, but to believe that they are here and guarding us, because if we look at history as indigenous people, with all these suppressions, with all the genocidal acts, with all the acts of eradication aimed at indigenous people, we wouldn't be here today.

So we know for a fact and we can humbly believe that the remains and their history that they left are our guardians and they will always be.

That is our interpretation in their courts, in their laws, and we ask, upon their honor, to respect that.

Senator Inouye, we have buried approximately 3,000 ancestors. We haven't put a cost on it, but we know it is going to be for the goodness of our people and those yet born.

I would like to say that without adequate input into this process—and, as you can see, the testimony that we have submitted says that time and time and time and time again—without adequate input from the indigenous people of this continent, of this country, without that input and without seeing an expeditious manner the reburying of these remains and returning of these artifacts, all we are doing is justifying the grave robbing that took place.

We don't see that adequate input from Indian Country. We're seeing the justification in 1995 of grave robbing.

There is a lot of frustration. There is a lot of emotion. There is a lot of pain in this subject, in this matter that we talk about today.

It has been pointed out through the morning that it is because of this—yes, because of lack of money; yes, because of lack of resources—because our ancestors and their remains being disturbed, we are suffering a lot of consequences from it.

How do we buy serenity? How do we buy that peace of mind?

In this sense, in English words, we say that with the return of our relatives we can attempt to address it, but we can't buy serenity. We can't buy peace of mind. We are asking just to be treated fairly, just to be heard, just to enhance and be able to build upon this government-to-government relationship, to be heard as these rules and regulations and policies are being promulgated.

We know what's going on now. We have suffered some of that pain through our parents and grandparents. It has been asked this morning if anybody's parents' or grandparents' or great-grandparents' graves were robbed, what would happen? It would end up in court. The perpetrators would get their due, what's coming. That's simply all we're asking. Just return them. Just return these remains to us, please. You've studied us long enough.

With regard to unidentifiable remains, we can believe that those remains dating back 500 years or more are American Indians. They are Native Americans and don't have to be studied any more. If that wasn't the case, again, there would have been a monumental court case. If those remains were not Native American, there would have been a monumental court case, but they are American Indians, and we're asking for their return. Take them out of those boxes. Take them off those shelves. Give them back to the people and let us decide how that should be done, because, after all, as American Indians, as indigenous people, those are our ancestors.

What would happen if we went to Europe? What would happen if we went to any other country and did that? That was done to us.

So there are a lot of unresolved grief issues that we're living with in Indian Country today. They are inter-generational. They are passed on time and time again.

What we're saying today is we know and we believe that, with the return of these remains, a lot of those inter-generational grief issues will be dealt with, will be addressed, and finally we'll begin to continue down that path of healing as American Indian people.

Our proposal is very simple: again, to look at government-to-government relationships. If we in Indian Country don't take advantage of this policy and this proclamation that President Clinton made, we would be part of paternalism and we would be part of one of the biggest jokes when it comes to American Indian policy with regard to the United States, because commonsense tells us that one policy is not going to work for 555 respective indigenous nations of North America.

Simply what we're suggesting as a start is to get a true government-to-government and to build on this government-to-government relationship that will allow us to develop regional policies of repatriation, as we're talking about today, policies of education regionally, and that would be a starting step to a true government-to-government relationship.

We know that the Government expended a lot of resources in signing those treaties, those land lease agreements—a lot of resources. They didn't just say one policy's going to take care of all of Indian Country. They went out and visited all of our respective ancestors in this process, and that's all we're saying—continue that respect.

So this would be a starting step to that process of coming out to Indian Country.

Today I have a council meeting going on at home. I have asked the leaders of our tribal government for permission to be here because we all believe this is a very, very important matter that needs to be addressed.

You can take a look at the testimony that we've provided. Unfortunately, we haven't gotten a chance to see any of the draft regulations. We were told that laws and mandates preclude us from seeing those. So some of the comments that are in here may have been addressed. We hope they have been—some of the frustration in here. But the point remains: We haven't gotten a chance to see those.

Just to give you an example of the frustration that was shared with the Review Committee, one of the items we bring out is that the proposed regulations published in May 1993 consisted of 15 pages. The proposed final regulations are reportedly over 140 pages. Again, this may be unfounded, because, as of 2 days ago, the regs have been published, but this is some of that frustration that's encountered when we don't have adequate American Indian input into policymaking.

After all, it's us. It's us who are going to be affected, so maybe it's good to have us as part of the process.

Last, what I would like to share—two requests. First, if we could get a copy of this transcript of what's being said today so we can match it up with what has been experienced for us with this process of NAGPRA repatriation. Second, if we can, before we leave this room, have a copy of the regulations that were published 2 days ago and not have to wait for longer periods of time to get those, we'd really, really appreciate it.

I apologize if some of the comments may have been offensive to policy, policymakers, or to the system, but when we take a look at remains, we're talking about our people, we're talking about their spirits, we're talking about their wisdom, we're talking about the connections they continued to make with us before the United States was a country. We know that those are of simplicity, those are of truthfulness, those are of honesty.

Again, I thank the individuals in our respective homelands that we currently occupy for their work that they have done as they have repatriated and continue to repatriate remains and articles of our ancestors. I thank them for their pain and their suffering and their tears that they shed for us.

And I thank you, the committee, for allowing me this opportunity to bring these issues before you. As is outlined in our testimony, we thank you for what you have done to make this historical law do what it was intended to do—open the door to the spirit world one final time for our loved ones and begin a healing process by returning the sacred items that we need to revitalize our nations [Native words].

[Remainder of testimony in Native tongue.]

Mr. TAKEN ALIVE. I thank you very much, Senator Inouye. If you've got comments or questions for us, we'd be happy to entertain those. Those that I can't answer, I'll ask my relative, Mr. Mentz, who is our lead person on this back home on Standing Rock and works with the North Dakota Intertribal Reinterment Committee, to answer some of the questions or comments that you would like to find at this time.

[Prepared statement of Mr. Taken Alive appears in appendix.]

Senator INOUYE. I thank you very much, Chairman Taken Alive. As I have indicated, we will be submitting a series of questions in writing, hoping that they will respond to them.

As to your request that the final regulations be available to you, I will have one here for you—my own. If you want additional copies, copies can be made. There are 35 pages of very fine print, and I would need new prescriptions to be able to read this. It is right here.

I would like to ask a question of not only you, sir, but all other interested parties. I think all of us will agree that when this process comes to an end, when all the existing tribes are recognized or not recognized, are fully satisfied that their ancestors have been returned to them, there will still remain in shelves and boxes throughout this land thousands upon thousands of unclaimed, unidentified human remains that we know are Native Americans. The question I ask is: Do you have any suggestions as to how we should provide them with a final resting place that they can go in peace?

Mr. TAKEN ALIVE. Yes; my response to that is: We would call upon our experts, we would call upon our respective spiritual leaders to ask guidance from the spirit world. This may seem preposterous, this may seem crazy as we speak in a setting as we are today to the many non-Indian friends and foes we may have. They may think, "Boy, those guys are crazy, they're ridiculous, they're losing their mind," but this is how we envision continued healing to occur. So we would call upon those means.

In fact, maybe they are here waiting for us to sit down with them and put into writing their words and their bits of advice. I know that the answer, the solution is out there, Senator. It's out there for us, but all we're saying is, in this system, give them an opportunity to offer their solutions, and just as the tip of the iceberg we talk about NAGPRA and how that has not happened.

That would be my response to your question, sir.

Senator INOUYE. Well, I hope that we can find some way to pay the proper respects to these ancestors of yours that are unidentified and unclaimed.

Mr. TAKEN ALIVE. If I could add on to that, Senator, at the turn of the century there was a historian or anthropologist who came to Standing Rock Reservation and attempted to record or did record a lot of the traditional songs, be they sacred, ceremonial, or social songs, and put them on a tape.

Since that time, everybody thought that was the gospel truth, what had been recorded. But because of technology at that time, not being able to preserve those recordings, we have come to find out, when we speed correct those particular songs, the words are different, the meaning is different.

The point I'm making: Sometimes we think through policy, sometimes we think in today's world that we're doing the right thing, but in reality we're not. We're not doing the right thing.

So I just want to try to emphasize or illustrate just what I have said. For almost 100 years, people thought that this was the gospel truth of some of those songs that were recorded.

I might add that they are stored at a Smithsonian Institute on wax means of recording. Come to find out, it is not the gospel

truth. When they are speed corrected, they have a totally different meaning. That's just to illustrate my point again.

Senator INOUYE. Thank you very much, Chairman Taken Alive.

If I may, I would like to call upon the chairman of the American Association of Museums and the president and chief executive officer of the Milwaukee Public Museum, William Moynihan.

STATEMENT OF WILLIAM MOYNIHAN, CHAIRMAN, AMERICAN ASSOCIATION OF MUSEUMS; PRESIDENT AND CHIEF EXECUTIVE OFFICER, MILWAUKEE PUBLIC MUSEUM, MILWAUKEE, WI

Mr. MOYNIHAN. Thank you, Mr. Chairman. I appreciate the opportunity to be here today and to testify on behalf of my own institution and the American Association of Museums.

I can say with some enthusiasm and great pride that the Milwaukee Public Museum is committed to implementing both the intent and the spirit of NAGPRA. It has been a commitment right from the beginning, and we'll see it through.

I thought it might be helpful to use our experience as an example from the museum world on just what we've been doing over the last few years.

As background, the Milwaukee Public Museum is an institution that's probably a mid-sized museum. We have a budget of \$8 million yearly. We have a staff of 135 people, full-time equivalents, and about 4.5 million items in our collections—the entire collections.

We were, when NAGPRA was passed, a department of Milwaukee County, but, because of decreasing funding from Milwaukee County, the museum became a private entity. In the process, we lost \$1.5 million worth of funding. We lost 27 percent of our staff. Our budgets were cut, and a lot of programs lost.

I think that's important background to get a sense of the commitment that we have made at the Milwaukee Public Museum, because our most recent estimates show that we will be committing well in excess of one-half a million dollars to implement the intent of Congress on this matter.

The task has been a daunting one. We've embraced it with enthusiasm, but it has been a daunting task.

We have approximately 50,000 items in our archaeology collection that are affected by NAGPRA, approximately 22,000 in our ethnology collections. Also, the institution has been collecting material for its 113 years of existence, so the records are uneven, depending on different professional standards over time, so we've had to go back and reconstruct records according to the questions we now have to answer that NAGPRA has brought to us.

Even given these circumstances, I think what we've done is laudatory. If there is any single accomplishment that has been most important to my institution, what NAGPRA has brought to us is a new and productive relationship with Native American groups.

We also have been conducting these inventories. We conducted the one by the deadline of 1993 by going beyond the law. We didn't just meet the minimum requirements. We went beyond and, I think, in the process built up a great deal of credibility and confidence in Native American groups that have dealt with us.

Since the 1993 deadline, we have been doing two things. One is dealing with the archaeology section, but also responding to numerous phone calls, site visits, and letters requesting further information. Again, I think we've gone beyond the law in the types of information and the completeness in our response.

We've also taken a leadership role whenever we could or whenever we were called upon to provide consulting help to area Native American groups interested in expanding their own museums, building new museums, care of the collection, or training professionals.

Like the museum world, in general, the lack of final regulations 5 years into the law and after two of the major deadlines had, in fact, passed caused problems for us. It caused ambiguities. It caused us to question a number of what should have been relatively straightforward decisions by calling colleagues at other institutions, by trying to come up with consistent responses, and it just caused more difficulty in our processes.

The other area that has caused difficulty is the funding area, as I said. We will have expended well in excess of half a million dollars. We have not been one of those museums who has been successful in receiving the NAGPRA grant.

Let me close by making the two recommendations that are in my written testimony. One may be not necessary any more. My written testimony called for the final issuance of the regulations, but I have not seen the final regulations. My understanding is there are still issues that are not completely addressed, and so they're not really final.

The Native Americans of this land and the museums need the final regulations finally after all this time in order to go about our business.

Second, I want to join my colleagues at this table and urge the Congress to urge the Department of Interior to increase the funding level available to Native Americans and available to museums to the \$10 million level.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Moynihan appears in appendix.]

Senator INOUYE. Thank you very much, Mr. Moynihan.

You've indicated that, because of certain problems such as funding, you have not been able to complete your inventory in the time allotted. How much more time do you think your museum will require to complete the inventory?

Mr. MOYNIHAN. Right, Senator. We are one of the museums that has requested an extension. We didn't realize the extent of the problems of our records in terms of our archaeological collections.

Our request is submitted for an extension of 2 years. Our feeling is we can do it within that time, short of that. We're going to try to do it well before that, but we've asked for a 2-year extension.

Senator INOUYE. Do you have any information about the larger museums, how much time they would need? Or do they need any time?

Mr. MOYNIHAN. I'm sorry, Senator. I don't know.

Senator INOUYE. Mr. Moynihan, I noted that when this process is over, when all of the existing tribes—and I use that word very definitely—existing tribes are satisfied that their ancestral remains

have been returned, there will still remain unclaimed and unidentified thousands of human remains, which everyone would conclude are Native Americans. What do you think we should do with them? Should the Secretary of the Interior promulgate regulations to address this problem?

Mr. MOYNIHAN. I'd like to respond on behalf of my own institution. I don't know the position of the American Association of Museums on this. I think it would be very important that we come up with a process that does not put the onus on an individual museum to determine where, in fact, remains should go.

I think there ought to be a process to return all the remains.

Senator INOUYE. It will be, I think, a major problem for all of us to address. We would like to work together with the leaders of Indian Country and leaders of the museum community to come up with something, because otherwise you're going to have on these shelves thousands of skulls and skeletal remains with no home, and I think all of us agree that we should treat these remains with the respect that they are entitled to and provide them with a final resting place.

So I look forward to receiving your thoughts and your recommendations in this area.

As to copies, we do not have too many, but we would be very happy to share the 35 pages with you.

Mr. MOYNIHAN. Thank you, sir.

Senator INOUYE. Once again, on behalf of the committee and on behalf of Chairman McCain, I would like to thank all of you for your patience in staying with us this morning and providing us with your wisdom, and, as we in Hawaii would say, your manao, because they are most helpful to us.

Apparently it would appear that, as a result of the recent court decision, amendments may be necessary to the act so that remains will be given adequate protection.

I would like to announce that the record will be kept open for 2 weeks. If you have any addendums, any supplemental information you would like to share with us, or if others in the audience would like to express their words, please submit them to the committee.

With that, thank you.

[Whereupon, at 12:05 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO

Mr. Chairman, thank you for providing me the opportunity to make a brief statement and thank you for holding this hearing on the status of the implementation of the Native American Grave Protection and Repatriation Act [NAGPRA].

As an original cosponsor of NAGPRA, while serving in the House, I strongly endorse the goals and objectives embodied in this statute. As I recall, this legislative initiative took many years to develop and went through many modifications prior to its enactment in 1990.

Central to the development of NAGPRA was to provide Indian tribal governments with the authority to reclaim vital elements of their respective cultures: Funerary objects, ceremonial objects, and bones of their ancestors, which are today housed and stored in museums and other repositories around the country. Enactment of NAGPRA is in many ways a vital element of our ability to preserve our native cultures.

It has been 5 years since NAGPRA was signed into law by President Bush. While there has been progress in the implementation of NAGPRA, it seems progress has been rather slow and incremental.

I do have some concerns regarding the implementation of NAGPRA. First, it is apparent that the costs associated with the implementation of NAGPRA are partly responsible for its slow implementation. Considering the tough budgetary constraints Congress currently finds itself in, funding may continue to be difficult. However, last year Congress did appropriate approximately \$3 million for the implementation that would allow museums and other institutions to complete their inventory process. I am interested to know what specific progress was made in this regard and to hear estimates on what further appropriations will be needed. I am also interested to know what other Interior agencies have been doing to comply with NAGPRA. Nonetheless, I would like to see NAGPRA continue to be funded at an appropriate level which will ensure continued success.

Second, I would also like to hear more about the actual implementation process. I realize implementation and funding go hand in hand. However, I am interested in what mandates have been accomplished, and to date, what it has yet to do, and what difficulties have been encountered.

Finally, the Repatriation Review Committee was kind enough to provide me with a copy of their report on NAGPRA. In this report the committee addresses the need to clarify the definition of "Indian tribe." I would like to hear more regarding the problems being encountered because of the current definition and what recommendations the committee has to alleviate these problems.

I am hopeful this hearing will enable the members of this committee to accurately understand what has been done to implement NAGPRA, and importantly, what more needs to be done to uphold our commitment to the Indian people, while maximizing the resources that are committed to the implementation of NAGPRA. I look forward to the testimony provided this morning, and I thank you all for your time.

PREPARED STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Mr. Chairman, I am pleased that the committee has decided to hold this most important hearing on the implementation of the Native American Graves Protection and Repatriation Act, Public Law 101-601. I am grateful to the chairman for extending an invitation to testify to Jesse Taken Alive, chairman of the Standing Rock Sioux Tribe, who is accompanied by Tim Mentz, the NAGPRA representative of the Standing Rock Sioux. I look forward to hearing their testimony and the testimony of the other distinguished witnesses here today.

I would like to take this opportunity to briefly mention that I have a long standing interest in the issues we are discussing today. As a member of the House, I secured passage of H.R. 1124 on November 13, 1989. This bill, which was designed to expedite the repatriation of Indian remains and grave goods by requiring Federal agencies to inventory and return Indian remains to tribes for reburial, was enacted into law on November 28, 1989, as part of the National Museum of American Indians Act.

Implementing NAGPRA is far more than an exercise in administrative rule-making. Indeed, it involves the very essence of Indian culture. For that reason, the Federal Government has a clear and compelling obligation to consult with the Indian people about this matter.

Unfortunately, I have received information from tribal officials in North Dakota which indicates exactly the opposite. They tell me that the proposed final regulations have been developed without meaningful consultation and without taking into account both the letter and the spirit of Public Law 101-601. I would like to take this opportunity to outline some of their serious concerns, which I hope will be addressed fully during the course of this hearing. I have contacted the Park Service and the BIA about these issues. Specifically, I have been told by Chairman Taken Alive, who will testify today, and by Chairperson Twila Martin Kekahbah, of the Turtle Mountain Band of Chippewa that:

Three drafts of regulatory language were compiled by Federal employees, without any tribal input, before members of the NAGPRA Review Committee were appointed, which means that the Review Committee began promulgating regulations after three drafts were produced without any guidance from the Indian community. In addition, the Bureau of Indian Affairs attended just one meeting with the other Federal employees who developed those initial three drafts. Obviously, the tone of the draft regulations had already been established by that time. Due to the lack of consultation, tribal officials find the entire definitions section problematic, most notably in the definitions of Indian lands and unassociated funerary objects. These two definitions very well could impact issues as fundamental as tribal sovereignty and the ability to fully implement NAGPRA according to Congressional intent, which was to provide for the return of certain ancestral remains, burial belongings and other sacred and cultural property to the Indian people.

The final proposed regulations have grown from approximately 15 pages to more than 140 pages. Despite this major increase in the length, and most assuredly the scope, of the regulations, the National Park Service decided through an internal administrative decision to not release the document for tribal review. Assistant Secretary Deer, correctly in my view, has refused to sign off on the proposed final regulations until they are published in the Federal Register with a 90-day public comment period so that tribes may voice their concerns. However, I am very disturbed by the Park Service's unwillingness to open up the regulatory process to the tribes.

As all members of this Committee are well aware, we have a special trust responsibility to Native Americans. I fear that this responsibility has not been met during the process by which the final proposed NAGPRA regulations were developed. I hope that today's hearing will bring such issues to light, and will result in the correction of any behavior which has resulted in the omission of tribal views from the development of a regulation to implement a law of such major importance to the Native American people.

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**Prepared Statement of W. Ron Allen, President
National Congress of American Indians (NCAI)**

To the Senate Committee on Indian Affairs

**On the Implementation of the Native American Graves
Protection and Repatriation Act (P.L. 101-601)**

6 December 1995

I. Introduction

Good morning Chairman McCain, Vice-Chairman Inouye and distinguished members of the Indian Affairs Committee. For those that do not know me, I am Ron Allen, President of the National Congress of American Indians (NCAI) and Chairman of the Jamestown S'Klallam Tribe. NCAI is the oldest, largest, and most representative American Indian / Alaska Native advocacy organization in the nation, comprised of nearly 200 member nations, dedicated to ensuring the sovereignty of native governments and the survival and viability of native culture. I respectfully submit this statement on behalf of our member tribes concerning the implementation of the Native American Graves Protection and Repatriation Act of 1990 (hereafter "NAGPRA").

Following the passage of NAGPRA Native Americans rejoiced at the prospect that our lost ancestors and sacred objects would be returned after decades of separation. Congress' intent in enacting NAGPRA was to ensure that Native American remains and funerary objects retained by the federal government, universities, and the museum community are returned to the appropriate tribes and tribal organizations. In providing a legal basis for the return of grave goods and human remains, NAGPRA is "remedial" legislation. However, NAGPRA cannot remedy the problem it was intended to unless and until adequate funds are appropriated so that tribes and museums can complete the repatriation process.

II. NAGPRA Grants to Tribes

Though Indian tribes are currently facing difficult times and an ever-changing legislative landscape in the 104th Congress, repatriation remains a major priority for Native people. We see the return of our ancestors as a return of our cultural and spiritual foundations; the very heart of our nations. To bring our people home to their rightful resting places, and to fulfill the mandates of NAGPRA we need the necessary funding. As the NAGPRA process continues to move forward, Native communities are being asked to assume a more prominent role in implementing NAGPRA. Following the statutory deadline for museum inventories in November 1995, repatriation activity will intensify and will continue to do so as we move

further along in implementing the Act. If the goals of NAGPRA are to be accomplished, Tribal access to funding is mandatory to assist them in working with the university and museum communities to identify and repatriate sacred objects and remains.

Our member tribes responded to an informal survey in 1993 taken to determine tribal needs in complying with the Act. The responses to the survey reveal that actual tribal need far exceeds both the National Park Service estimates of financial need and the grant funds appropriated for FY94 and FY95. As you know, the university and museum communities have begun to present their inventories to the tribes. These inventories list literally millions of sacred objects and ancestral remains and as they are received, Indian tribes must respond to them under the mandates of NAGPRA. Tribal response requires funding for technical expertise (historical, anthropological, ethnological, and archaeological) as well as appropriate legal assistance, especially in disputed repatriation claims. Under the provisions of NAGPRA, a dispute over a repatriation is heard by the NAGPRA Review Committee. However, it is still necessary for tribes to hire independent experts to make their case. These experts can be extremely expensive and most tribes simply do not have the funding available to hire them.¹

Section 10 of NAGPRA authorizes the Secretary of the Interior to make grants to the Tribes for the purpose of "assisting such tribes and organizations in the repatriation of Native American cultural items." Furthermore, the United States has a trust responsibility to Indian tribes and their members concerning the potentially repatriated goods and remains. This responsibility carries with it the highest of fiduciary standards guiding the conduct of federal agencies, here the National Park Service and the Department of the Interior, in their treatment of tribes in the area of repatriation. Given recent appropriations experience, it is unlikely the federal obligation to tribes will be fulfilled in the realm of repatriation.

Despite a joint tribal - museum community request of some \$10 million for FY94 through FY96, Congress has again appropriated a fraction of that amount (\$2.3 million) for NAGPRA -related grants. This funding level is far below the projected funding level needed to comply with the provisions of the Act and well below the \$10 million level. Mr. Chairman, I think you can understand that tribes must be provided with sufficient funding to be equal partners in the NAGPRA process or it simply will not succeed. Museums and universities already have much of the resources and qualified staff persons available to implement the process, while tribes must take on the task of hiring new staff and developing a whole new implementation program to comply with the mandates of the Act. It is imperative, Mr. Chairman, that any review of the progress made in implementing NAGPRA over the past four years factor in the relative scarcity of federal funding to ensure its ultimate success.

¹ In the Larson Bay case of 1991 the Smithsonian Institution contested the right of the Larson Bay Tribal Council to all of the remains unearthed at the Larson Bay burial site. Because of this dispute, the Native American Rights Fund, who represented the Larson Bay Tribal Council, was required to retain experts in anthropology to help with their case. The Smithsonian hired their own experts and there was considerable debate before it was eventually determined that sufficient evidence existed to warrant the return of the remains.

III. Conclusion

Mr. Chairman, today I have only touched on the most critical of obstacles hindering the full and complete implementation of the NAGPRA --- basic funding for Indian tribes. To properly and faithfully carry out Congressional intent and in order to facilitate the NAGPRA process, tribes must have access to NAGPRA funding. Enclosed are copies of Resolutions NV-93-202 and NV-93-170, adopted by our member tribes regarding grant levels made available to Tribes under the Act. As you can see, our tribes have expressed the need for funding sufficient to "meaningfully implement" the Act; and have also urged that tribes receive "the full amount of the appropriations authorized under the NAGPRA allocation." (See attached resolutions). While acknowledging the difficulties of the current budget situation, it is imperative that sufficient funding is made available to tribes now. In the alternative, the level of funds necessary to ensure compliance with the Act in the years ahead will be even greater.

Mr. Chairman, I again wish to thank you for the opportunity to submit this statement, and I look forward to appearing before you very soon to discuss the many problems facing Indian tribes and Alaska Native villages.

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National Congress of American Indians

Est. 1944

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RESOLUTION NO. NV-93-170

RESOLUTION TO SUPPORT FULL PROTECTION OF FUNERARY REMAINS

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution:

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and comprised of representatives of and advocates for national, regional, and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of NCAI; and

WHEREAS, the desecration of funerary remains and objects is still rampant throughout all geographic areas in the United States; and

WHEREAS, the Native American Graves Protection and Repatriation Act (NAGPRA) does not wholly address these hundreds of desecrations within state and private lands that are perpetrated by graverobbers who are motivated by greed, except for the state of Hawaii;

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby support amendatory language to the NAGPRA to extend protection of funerary remains and objects on all lands within the exterior boundaries of the U.S. wheresoever they may be situated.

BE IT FURTHER RESOLVED, that the tribes receive the full amount of the appropriations authorized under the NAGPRA allocation.

CERTIFICATION

The foregoing resolution was adopted at the 1993 Annual Convention of the National Congress of American Indians, held at the Nugget Hotel, in Reno/Sparks, Nevada, on 3rd day of December 1993, with a quorum present.



gaiashkibos
gaiashkibos, President

ATTEST:



Diane Tegley
Recording Secretary

Adopted by the General Assembly during the 1993 Annual Convention, November 28-December 3, 1993, Reno/Sparks, Nevada.

National Congress of American Indians

Est. 1944

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RESOLUTION NO. NV-93-202

RESOLUTION TO REQUEST GRANT APPROPRIATIONS FROM THE NATIONAL PARK SERVICE FOR THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution:

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and comprised of representatives of and advocates for national, regional, and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of NCAI; and

WHEREAS, on November 16, 1990, President George Bush signed into law P.L. 100-601 the Native American Graves Protection and Repatriation Act (NAGPRA); and

WHEREAS, the NAGPRA requires federal agencies universities and museums which received federal funding on or after November 16, 1990, to undertake and complete a summary of all portions of their collections to determine what if any items which may be classified as a unassociated funerary object, a sacred object or object of cultural patrimony subject to the repatriation provisions contained in the NAGPRA and that such summaries were to have been completed by November 16, 1993; and

WHEREAS, the NAGPRA requires that these federal agencies, universities and museums identify the cultural affiliation of any such objects by the use of the anthropological and archaeological record, ethnographic information, written literature and other methods; and

WHEREAS, the NAGPRA requires that these federal agencies, universities and museums initiate "consultation" with Tribal organizations, groups and families; and

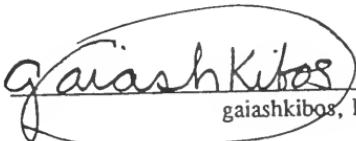
WHEREAS, the National Park Service is designated as the agency charged with administering a grant program to aid Tribal organizations, groups and families with repatriation activities.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby request and support the appropriations necessary to meaningfully implement the NAGPRA;

BE IT FURTHER RESOLVED, that the NCAI further requests that the National Park Service outline it's plan to administer a grant program for Tribal organizations eligible for funding assistance under the regulations developed by the National Park Service.

CERTIFICATION

The foregoing resolution was adopted at the 1993 Annual Convention of the National Congress of American Indians, held at the Nugget Hotel, in Reno/Sparks, Nevada, on the 3rd day of December 1993, with a quorum present.



gaiashkibos
gaiashkibos, President

ATTEST:



Recording Secretary

Adopted by the General Assembly during the 1993 Annual Convention, November 28-December 3, 1993, Reno/Sparks, Nevada.

TESTIMONY OF THE
AMERICAN INDIAN RITUAL OBJECT REPATRIATION FOUNDATION
SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT
OVERSIGHT HEARING

DECEMBER 6, 1995

The American Indian Ritual Object Repatriation Foundation (AIRORF), located in New York City, is an intercultural partnership committed to the return of sacred objects to the indigenous peoples of this country and to educating the public about the importance of repatriation. As a resource and conduit for sacred materials, AIRORF has handled requests for information and assistance from American Indian, Alaskan Native and Native Hawaiian individuals, families and tribes, as well as organizations, museums, private collectors, commercial enterprises, concerned individuals and the media.

Obviously, the complete and successful implementation of the Native American Graves Protection and Repatriation Act (NAGPRA) is critical if repatriation efforts are to succeed and AIRORF is vitally interested in NAGPRA and its implementation. Indeed, in conjunction with the National Indian Policy Center, AIRORF is publishing a NAGPRA Implementation Manual for tribes which will be available early next year.

There is no doubt that NAGPRA has already had a great impact. Substantial repatriation has occurred both under the Act and, increasingly, outside of the Act. For example, AIRORF has specifically assisted in return of objects from private art collectors -- activity which is an indirect result of the greater

public consciousness that has resulted from NAGPRA. In a number of instances, museums and Indian tribes are forging new cooperative relationships and Indian people have far more information about museum collections than they have ever had previously.

Nonetheless, AIRORF is concerned about certain obstacles which have the potential to undermine the long-term implementation of NAGPRA. It is those obstacles which are the subject of this testimony.

Our concerns fall into six categories:

1. The failure of both the Act and implementing regulations to adequately protect remains from intrusive scientific procedures, even where a tribe with the right to possess those items objects.

2. The substantial delays in the repatriation process required by the new regulations.

3. The potential for the repatriation process to be extremely costly for tribes, as illustrated by recent repatriation claims handled by the Smithsonian.

4. The failure to adequately address the concerns of Indian tribes who are not recognized by the Secretary of Interior.

5. Inadequate funding for implementation.

6. The future treatment of culturally unidentifiable remains and objects.

The Failure to Limit Invasive and Objectionable Scientific Study

It has come to AIRORF's attention that some museums are conducting intensive and intrusive studies of remains ostensibly to

determine or confirm their cultural affiliation. This has occurred even in instances where a tribe that has a likely affiliation with the remains based upon existing information has objected to the study. Such studies may be highly offensive to tribes. Unfortunately, however, the adopted regulations do nothing to limit or discourage such activities.

Moreover, in terms of remains and cultural items still imbedded in the ground, the recently approved regulations will permit extensive studies of unearthed materials even where the tribal right to possess and control remains and items is clear immediately upon discovery. The written plan that must be developed by the Federal land manager under the regulations assumes the right of an excavator to perform various analyses in regard to the items unearthed during an indeterminate period before the remains or objects are disposed of in accordance with the custody section of the regulations. 43 C.F.R. 10.5(e)(4), (5) and (9). Since 43 C.F.R. 10.6 builds significant delays into the process of relinquishing possession of remains or cultural items to a tribe even where the tribe with the requisite interest is clearly known, a tribe's ownership or control interest will not prevent excavation or analysis of remains and items that may be offensive to the tribe.

This practice of some museums and the procedures for imbedded materials in the regulations are not consistent with the protective intent of NAGPRA. When NAGPRA was enacted, the Senate Indian Committee Report explicitly stated that the inventory provision did

not "require museums...to conduct exhaustive studies and additional scientific research to conclusively determine...cultural affiliation." In fact, NAGPRA specifically states that it "shall not be construed to be an authorization for the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects." Rather, NAGPRA's intent was merely to require a good faith effort to identify cultural affiliation based upon presently available evidence. As stated in the Senate Report, it is not necessary that cultural affiliation be established with "scientific certainty".

Moreover, in terms of imbedded remains and materials, the Senate Report indicated that the process in NAGPRA was designed to provide Indian tribes with "the opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains...or objects...[and in the context of inadvertent discovery] 30 days in which to make a determination as to appropriate disposition for these human remains and objects."

Notwithstanding this clear Congressional intent that NAGPRA not serve as the impetus for scientific study of remains, it appears that the inventory process is having that very effect and that there is great potential that the regulations on imbedded materials will also encourage more scientific study. It is essential that Congress take action to rectify this problem.

At a minimum, it should strongly urge the Park Service to

develop and circulate an advisory memorandum to all Federal land managers and museums indicating that scientific study of remains -- particularly those that are likely to be claimed by a tribe based upon existing evidence -- should be kept to a minimum. In addition, Congress should consider amending NAGPRA to place limitations upon scientific studies of remains and cultural items-- at least where a tribal claim is likely based upon evidence existing at the time that a particular scientific study is proposed.

Repatriation Delays in the Regulations

AIRORF is greatly concerned about 43 C.F.R. 10.10(b)(2) of the adopted regulations. This section appears to prevent any repatriation of human remains and associated funerary objects until after a museum fully completes its inventory. Such a restriction is utterly contrary to the intent of the Act and even the practice of most museums since the Act has passed. NAGPRA provides an independent right to repatriation aside and apart from repatriation rights established pursuant to an inventory and explicitly disclaims any intent to limit museum authority to repatriate. Yet, it appears that limiting museum authority to repatriate would be the result of this regulation. The testimony at the hearing indicated that 73 museums have requested an extension of time for completion of the inventory. Moreover, many museums who have not requested an extension have nonetheless not completed their inventories. It is possible that this provision could prohibit repatriation in the case of all of these museums.

AIRORF urges Congress to put immediate pressure on the Park Service to clarify the meaning of this regulation if it does not mean what it appears to say or to withdraw this provision if it does. If the Park Service refuses, Congress should immediately act upon an amendment to NAGPRA which would make clear that inventory completion is not a prerequisite for repatriation.

The Excessive Cost of Repatriation

AIRORF is also concerned that the cost to tribes of establishing cultural affiliation and obtaining repatriation of human remains and cultural items can become excessive. It appears that this has been a particular problem in some instances with the Museum of Natural History at the Smithsonian. As a first step to addressing this problem, AIRORF recommends that Congress sponsor a dialogue between the Smithsonian and interested Indian tribes and national organizations. The goal of this dialogue would be to determine if there are methods or procedures which can be developed to streamline the repatriation process.

In terms of the Smithsonian, its separate statutory authority for repatriation may be part of the underlying problem in that the Museum of the American Indian Act requires cultural affiliation to be based upon the best available scientific and historical documentation, but includes no deadline for the completion of an inventory of remains and funerary objects. Thus, it may be that subjecting the Smithsonian to the provisions of NAGPRA would result in a more streamlined repatriation process within that institution. Nonetheless, NAGPRA itself also has the potential to give rise to

costly disputes. Thus, this proposed dialogue with the Smithsonian might also serve to identity solutions for reducing costs which would be more broadly applicable to the repatriation process.

Indian tribes unrecognized by the Secretary of Interior

The definition of "Indian tribe" in NAGPRA refers to tribes eligible for services provided by the United States, not merely Department of Interior services. In its original guidelines for implementing NAGPRA, the Park Service recognized that in addition to the list of federally-recognized tribes maintained by the Bureau of Indian Affairs, "other Federal agencies also offer benefits specifically to Indians". 43 C.F.R. 10.2(b)(2), issued on December 4, 1995, requires the Secretary to prepare a list of Indian tribes covered by the Act. The Park Service has indicated that this list will include only tribes recognized by the Secretary of Interior, notwithstanding Abenaki Nation of Missiquoi v. Hughes, 20 ILR 3001 (D.Vt.1992) which interpreted NAGPRA in accordance with the broader approach recognized in the earlier guidelines.

AIRORF agrees with the Chairman of the Standing Rock Sioux Tribe that NAGPRA should protect those tribes which are not recognized by the Secretary of Interior, but which nonetheless "maintain a responsibility toward their ancestors and their items of sacred and cultural patrimony." Congress should urge the Secretary of Interior to include all tribes which receive funding from any federal agency on the list which he is developing pursuant to the regulations and take appropriate legislative action if the Secretary fails to do so.

The need for adequate federal funding

Numerous witnesses at the hearing expressed their concern that inadequate funding could thwart the efforts of museums to comply with NAGPRA and limit the ability of tribes to take advantage of the opportunities that the Act provides. In the five years since NAGPRA was enacted, AIRORF has observed a significant change in the relationship between museums and Native Americans -- tension has often given way to a more understanding, cooperative relationship as NAGPRA-prompted interactions have taken place. It would be tragic if this unique intercultural opportunity were to be lost due to a lack of funds to implement this landmark legislation. Thus, we support the requests for \$10 million for NAGPRA funding made by a number of the witnesses at the hearing.

The future treatment of culturally unidentifiable remains

AIRORF fully endorses the NAGPRA Review Committee's preliminary recommendation that "[u]ltimately, decisions about what happens to the [culturally unidentifiable] remains of Native American individuals from anywhere in the United States and associated funerary objects should rest in the hands of Native Americans." The inclusion of associated funerary objects in its proposal is a particularly welcome and important part of the recommendation by the Review Committee. AIRORF urges Congress to provide such legislative authority as may be needed to effectuate this worthwhile goal.

AIRORF's board, staff and consultants have a great deal of

expertise in the field of repatriation and include traditional Native Americans, social science and legal experts and individuals with lengthy and diverse museum experience. AIRORF would be more than happy to share this expertise with the Senate Committee and work with the Committee in any way that the Committee might find helpful.

AIRORF is greatly appreciative of the Committee's ongoing interest in ensuring that the NAGPRA is fully and successfully implemented.

TESTIMONY OF
CECIL F. ANTONE, LIEUTENANT GOVERNOR
GILA RIVER INDIAN COMMUNITY, ARIZONA
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING THE NATIVE AMERICAN GRAVES PROTECTION AND
REPATRIATION ACT
DECEMBER 6, 1995, WASHINGTON, D.C.

The Gila River Indian Community (the "Community") is honored to provide testimony before the Senate Committee on Indian Affairs on the implementation of the Native American Graves Protection and Repatriation Act ("NAGPRA"). I first express my personal thanks and the appreciation of the Community to Senator McCain and Senator Inouye for their dedication and devotion in causing the passage of NAGPRA. Indian tribes now have the legal authority to repatriate their cultural and spiritual items. The Community is especially thankful for the authority because Pimas and Maricopas of the Community, in compliance with our respective traditions, feel every effort must be made to repatriate our ancestors to their homeland.

The Community, over the last three years, has received more than 150 letters from various museums and federal agencies regarding the disposition of collections as required by the Act. There is an obvious need for the regulations mandated by NAGPRA to be promulgated as Indian Tribes throughout the United States are now grappling with the sometimes complex repatriation issues. The Community and other O'Odham tribes, the Salt-River Pima-Maricopa Indian Community, the Ak-Chin Indian Community, and the Tohono O'Odham Nation have developed pragmatic and effective understandings and agreements with federal agencies for consultation and mediation of specific archeological properties. Our most recent agreement was with the United States Air Force and involved funerary objects and human remains on the land where Williams Air Force Base was formerly located. The closure of Williams Air Force Base

near our Reservation caused us to act to protect the funerary objects and remains. We recognize that NAGPRA has not been fully implemented and we urge this Committee make every effort to cause the complete implementation of NAGPRA.

The Community does have a positive history and experience in repatriation of human remains and funerary objects. This has occurred through our efforts and in accordance with the laws of Arizona. Since 1989, the four O'Odham tribes have reburied more than 3,000 ancestors. The Community has established a relationship with the Arizona State Museum based on mutual respect and this has resulted in a high degree of cooperation in the repatriation of human remains and funerary objects. However, one of the difficulties that Indian tribes face is the lack of physical resources to house collections as the collections are transferred and received from museum institutions and federal agencies. Federal funds were not identified in NAGPRA and the current restrictions on federal funding makes it difficult to develop and construct the necessary facilities to house collections. It is apparent that Indian tribes must develop partnerships with federal and state agencies. The Community has taken steps to enter into cooperative agreements with governmental entities. For instance, in November 1995, the Bureau of Reclamation agreed to develop and construct a repository to house all Central Arizona Project archeological material collected during the construction of the Project. The repository will be located on Community lands. As part of our commitment to this agreement, the Community will be utilizing its resources to support and fund this repository.

We are deeply thankful for the opportunity NAGPRA has presented so that we are able to maintain our cultural traditions. We also intend to continue to maintain the

**Testimony of Cecil F. Antone, Lt. Governor
Gila River Indian Community**

relationship and partnership with federal agencies. The Pimas and Maricopas of the Community view NAGPRA and its eventual implementation as an extremely significant step in assisting Indian nations to properly care for their ancestors. This is an important step in assuring cultural stability for generations to come.

I thank you for this opportunity to comment on implementation efforts regarding NAGPRA, and I will respond to any questions you may have.

*Keepers
of the
Treasures*



Alaska

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STATEMENT TO THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING THE STATUS OF IMPLEMENTING THE
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

December 18, 1995

Prepared by Ellen Bielawski, Ph.D.
Executive Director and NAGPRA Project Director
and Directors of KTA

Note: The author is not a native person, but has written as "we", having been directed to prepare this summary of the board's comments and her archaeological and museum experience.

Keepers of the Treasures Alaska (KTA) is an Alaskan native non-profit organization supporting the efforts of Alaskan native people to reclaim, revitalize and perpetuate their diverse cultures and languages. KTA's Board of Directors is comprised of one representative of each of the 12 regions established under the Alaska Native Claims Settlement Act, one at-large member, and one ex officio liaison member of the national Keepers of the Treasures. KTA members represent all of Alaska's native and non-native people and live all over the state.

Currently KTA holds a grant from the Administration for Native Americans to assist four (4) Alaskan village councils undertaking repatriation.

We submit these comments in support of some of the testimony presented on December 6, 1995, with the addition of specifically Alaskan perspectives on NAGPRA.

KTA urges Congress to appropriate at least \$10 million in FY1996 for implementing NAGPRA. In Alaska, NAGPRA and the required summaries and inventories went to organizations unprepared to act on the opportunity NAGPRA represents for returning ancestral remains and healing the wounds caused by their removal. In many cases, there are no human nor financial resources to write the grant proposals required for accessing NAGPRA funds available to federally-recognized tribes and organizations. KTA undertook to assist villages in implementing NAGPRA precisely because so many villages in Alaska lack even the resources to access the funds that would allow them to learn about and implement NAGPRA.

It should also be recognized that while costs are high everywhere, there are generally much higher in Alaska than in the Lower 48 states. Under NAGPRA, native people must visit some museums to work with museum staff on repatriation. Most of the villages, and the burial grounds from which ancestral remains were taken, are not accessible by road. Distances between museums and villages, even within the state, are long. This means that any travel associated with NAGPRA, as well as the shipment of repatriated remains and objects, will be more costly than

elsewhere. Similarly, costs of communication are higher than elsewhere, by phone, fax, e-mail and so on. Because many Yupik and Inupiat Elders speak only their native language, interpretation costs are substantial, especially when addressing words, concepts and issues that do not translate comfortably across the cultural boundaries between museum staff and native people.

KTA also strongly suggests that Congress address the question of native peoples and organizations not formally recognized by the federal government. In the words of an Alaska Keeper: "it didn't matter...when the human remains of non-federally recognized Indian tribes were taken...it irks me that living human beings are technically not in existence merely because the U.S. Government does not recognize them." We feel that carrying out repatriation only through federally-recognized entities goes against the spirit of NAGPRA, and the empowerment and healing it is to foster among native americans.

In Alaska, the Corporations created under ANCSA are federally-recognized. Both regional and village corporations have received abundant museum summaries and inventories. Yet for many, the initiative required to implement NAGPRA is far outside the scope and interests of corporate, profit-making activities. The parallel non-profit native organizations are chronically overburdened and always struggling to stay in touch with their members across large areas. NAGPRA needs to be addressed both regionally and locally. In some cases, local cemeteries were excavated and large numbers of individual remains taken. In others, the summaries and inventories

indicate very dispersed remains with affiliation by region at best. At present, however, there is little NAGPRA activity dedicated to integrating regional and local cases. The emphasis on federally-recognized tribes works against the notion of everyone in a region working together to repatriate large, discrete collections of human remains and remains from across a region, often more widely dispersed throughout museums. At present NAGPRA and implementation funding emphasize federally-recognized entity consultation with museums; a truer treatment of our ancestors would recognize that we are all their descendants and that we should work together on bringing our people home. This need is especially great concerning the repatriation of culturally unaffiliated remains (see Alaska Federation of Natives Resolution 95 - 59).

We are very concerned that some museums and institutions (including the Smithsonian Institution which, while not subject to NAGPRA, should be) continue to engage in studies of human remains. Our experience suggests that museums and institutions may attempt to carry out work with our ancestors' remains that they call documentation and we know is at best against our expressed wishes and at worst profane (See Alaska Federation of Natives Resolution 95-61, attached).

Parallel to the power the federal government holds to recognize the tribes and organizations with repatriation rights through NAGPRA is the power museums and institutions hold under NAGPRA to determine what is sacred. This can only be determined by Native American spiritual leaders. While NAGPRA is not directly

concerned with sacred places, only sacred and religious objects, it does apply to tribal and federal lands. Greater protection of Native American graves and otherwise sacred places, is required outside of tribal and federal lands. For example, one multi-jurisdictional dispute currently allows marked native graves to serve as lawn ornaments ostentatiously visible to tourist and local traffic along a heavily travelled highway just north of Anchorage.

Museums and other institutions are allowed to access to tribal confidential information, but no controls are in place to keep such information confidential. This is common sense violation of a fundamental intellectual property right. The information belongs to the tribes, and anyone desiring or requiring use of it must do so only in accordance with the wishes, agreement and informed consent of the people whose knowledge it is.

We thank you for the opportunity to address these concerns in testimony before the Committee. We trust that you will address these and the concerns of others brought to your attention. In the attempt to balance the budget, Congress seems to look primarily at dollars, cash flow, interest payments, and debt. The United States, and the museum, ethnology, anthropology, medical and other scientific and arts communities owe a huge debt to American Indians, Native Hawaiians and Alaskan Natives. This cannot be paid simply in dollars. If NAGPRA is adequately supported and carried out with goodwill and the continued spiritual guidance that brought us this far, the healing can begin in earnest. Only in working together towards healing the relationship between native people and the United States will the debt be forgiven.

ALASKA FEDERATION OF NATIVES

1995 ANNUAL CONVENTION

RESOLUTION 95-61 .

TITLE: URGING THE NATIONAL MUSEUM OF NATURAL HISTORY-SMITHSONIAN INSTITUTE TO RESPECT REPATRIATION CLAIMANTS

WHEREAS: we, the members of the Alaska Native community, invoking the divine blessing of the Creator upon our efforts and purpose to support the indigenous peoples of Alaska in reclaiming, revitalizing and perpetuating our diverse cultures and languages; and,

WHEREAS: as members of the Alaska Native community we will support and assist the preservation, maintenance and revitalization of the past and present cultural lifeways unique to American Indians, Alaska Natives and Native Hawaiians; and,

WHEREAS: Public Law 101-185, otherwise known as the National Museum of the American Indian Act states in Section 11 providing for the Inventory, Identification and Return of Indian Human Remains and Indian Funerary Objects in the Possession of the Smithsonian Institution that the Smithsonian "...upon the request of the descendants of such individual or of the Indian Tribe shall expeditiously return such remains (together with any associated funerary objects) to the descendants or tribe"; and

WHEREAS: it is evident that per the National Museum of Natural History's policy entitled "Documentation of Human Skeletal Remains" dated June 17, 1993, intended to establish procedures for identifying the place of origin of human remains, has instead allowed additional study of human remains regardless of whether those remains have already been identified as to origin and place for purposes of repatriation; and,

WHEREAS: it is incumbent upon us as the descendants of the ancestral remains "housed" at the National Museum of Natural History to have the wishes of tribal authorities and lineal descendants respected regarding additional documentation of human remains;

ALASKA FEDERATION OF NATIVES

1995 ANNUAL CONVENTION

RESOLUTION 95-59

TITLE: REPATRIATION AND DISPOSITION OF UNIDENTIFIED ALASKA HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS

WHEREAS: we, the members of the Alaska Native community, invoking the divine blessing of the Creator upon our efforts and purpose to support the indigenous peoples of Alaska in reclaiming, revitalizing and perpetuating our diverse cultures and languages; and,

WHEREAS: as members of the Alaska Native community we will support and assist the preservation, maintenance and revitalization of the past and present cultural lifeways unique to American Indians, Alaska Natives and Native Hawaiians; and,

WHEREAS: under Public Law 101-601 the Native American Graves Protection and Repatriation Act (NAGPRA) and Public Law 101-185 the National Museum of the American Indian Act, the indigenous communities of Alaska will have the opportunity to determine the final disposition of any or all unidentified ancestral human remains, along with any funerary objects located in museums, universities, colleges and collections throughout the United States;

NOW THEREFORE BE IT RESOLVED, that the Alaska Federation of Natives supports the formation of a statewide steering committee to explore means for the final disposition of these unidentified Alaska and/or unclaimed ancestral human remains.

BE IT FURTHER RESOLVED that the Alaska Federation of Natives, Inc., call upon the Keepers of the Treasures* Alaska to serve as liaison with the statewide steering committee.

BE IT FURTHER RESOLVED that the Alaska Federation of Natives, Inc., calls upon other Alaska Native organizations to actively support and participate in the planning and coordination of the final disposition of the herein mentioned human remains and funerary objects.

SUBMITTED BY: Keepers of the Treasures* Alaska

COMMITTEE RECOMMENDATIONS: Do Pass

CONVENTION ACTION: PASSED



NOW THEREFORE BE IT RESOLVED; that the Alaska Federation of Natives Convention call upon all available resources, including, but not limited to, the Alaska Congressional Delegation to assist in instituting change within the Repatriation Office of the Smithsonian's National Museum of Natural History that respects claimants' wishes for the treatment of the remains.

SUBMITTED BY: Keepers of the Treasures* Alaska

COMMITTEE RECOMMENDATION: Do Pass

CONVENTION ACTION: PASSED



TESTIMONY OF ELIZABETH BLACKOWL, PRESIDENT OF
THE PAWNEE TRIBE OF OKLAHOMA, BEFORE THE SENATE
INDIAN AFFAIRS COMMITTEE, DECEMBER 6, 1995

Good morning, Chairman McCain and respected members of the Indian Affairs Committee. My name is Elizabeth Blackowl and I am the President of the Pawnee Tribe of Oklahoma. Thank you for the opportunity to offer testimony before this committee on behalf of the Pawnee Tribe regarding the implementation of the Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA").

NAGPRA ranks among the most important Native American human rights laws ever enacted. NAGPRA establishes national guidelines and procedures for federally funded museums and federal agencies to repatriate important cultural items to appropriate Native American tribes and people. Mr. Chairman, NAGPRA can and has worked. Since 1989, the Pawnee Tribe has repatriated and reburied well over one thousand (1,000) human remains and funerary objects under state and federal laws.

The reinterment of our ancestors in accordance with Pawnee traditions has been an important activity for our entire Tribe. For example, Senator McCain, we were deeply moved by your presence at the ceremonies held at Ft. McNair last June, when the remains of six Pawnee Scout U.S. Army veterans were repatriated, with your assistance, from the National Museum of Natural History for reburial in Nebraska with full military honors. The repatriation and reburial of these war dead with the assistance of the Defense Department's Office of Casualty Affairs gave the true meaning of NAGPRA to the Pawnee, Arikara and Wichita people who attended the reburial services in Genoa, Nebraska; and we continue to appreciate your efforts to see that those veterans were laid to rest with the dignity and honor that they deserved.

However, NAGPRA implementation efforts are expensive and time-consuming and could be improved by our nation based upon five years of experience with the important law. Indeed, similar to the civil rights legislation and policies of the 1960's which are still being implemented today, NAGPRA will take years for our Nation to fully implement, because NAGPRA addresses a widespread national problem. Hopefully, through the good will efforts of this Committee, Indian tribes and museums, we can strive to improve implementation efforts.

Toward that end, I highly commend the Committee for its hard work in passing NAGPRA in 1990 and for holding this oversight hearing in 1995 to see how the law is working from the perspective of affected Indian Tribes and museums. I hope my testimony regarding Pawnee experiences and recommendations will be of assistance to the Committee and to the museum and Indian communities.

My testimony covers three areas: **First**, I will discuss the background of Pawnee repatriation efforts since 1989. **Second**, I will raise some concerns or problems which our Tribe experienced in implementing NAGPRA. **And, third**, I will respectfully offer some recommendations to address the concerns which we encountered, for the Committee's consideration.

BACKGROUND OF PAWNEE NAGPRA IMPLEMENTATION EFFORTS.

Like many Indian Tribes, the Pawnee Tribe was historically subjected to massive disturbances of tribal cemeteries and burial grounds. Additionally, many important Pawnee cultural items or patrimony, such as important communally owned ceremonial bundles, left tribal hands over the years -- especially in 1892 -- 1934 period when traditional Indian religions were banned by the Federal Government -- under questionable circumstances. Much of this sad history was presented to this Committee in 1989 and 1990 in support of the passage of NAGPRA and the National Museum of the American Indian Act ("NMAIA") and will not be repeated in my testimony today. Needless to say, the Pawnee Tribe joined Indian country in strongly supporting the passage of NAGPRA and NMAIA, because these were greatly needed laws to protect the religious sensibilities, equal protection and property rights of the Pawnee people.

Since 1989, the Pawnee Tribe has been heavily involved in repatriation and reburial activities under state and federal repatriation laws. Almost eleven hundred (1,100) deceased tribal ancestors and associated funerary objects have been reburied to date in four separate reburial ceremonies conducted in our aboriginal homeland of Kansas and Nebraska. Because of the large scope and complex nature of these efforts, the Pawnee government established a Repatriation Committee to work with tribal members, elders, experts, legal counsel and museums. Our efforts have been supported by the legal work and experts of the Native American Rights Fund (NARF:) without which the Tribe would not have been able to accomplish these tasks.

While repatriation is an expensive and time consuming task for our hard-pressed, impoverished tribal government, the Pawnee Tribe has deeply appreciated its opportunity to successfully carry out this work, because of the extreme importance of reburying our dead.

Mr. Chairman, let me just briefly summarize the four reburial experiences of the Pawnee Tribe since, 1989, prior to sharing our concerns and recommendations. The first three reburials occurred under state laws; and the fourth reburial occurred under NAGPRA and the NMAIA which my testimony and recommendations will focus on.

As to the state law repatriations, the first took place in the Spring of 1990, when the Pawnee, Arikara and Wichita people reinterred approximately 170 common ancestors (dating from A.D. 1000 to 1400) in Salina, Kansas, pursuant to a special Kansas state law. Later in 1990, the Tribe reburied approximately 400 Pawnee Indians (dating from A.D. 1550 to 1875) in a cemetery at Genoa, Nebraska, under the provisions of the Nebraska Unmarked Burial Sites and Skeletal Remains Protection Act of 1989 (Neb. Rev. Stat. Secs.12-1209-1211). The third reburial occurred in 1991, when the Tribe reburied about 125 Pawnee Indian (dating from A.D.1000 to 1400) near McCook, Nebraska. These dead had been in the custody of the Nebraska State Historical Society and were repatriated and reburied under the provisions the Nebraska state law. All of these state law reburials were based upon tribal repatriation claims which pre-dated the passage of NAGPRA.

The fourth reburial occurred in June of 1995, when the Pawnee, Arikara and Wichita people reburied approximately 400 human remains and associated funerary objects in a mass grave near Genoa, Nebraska, according to tribal rites and with military honors for some of the deceased who were U.S. Army veterans. These dead were repatriated from four state and federal museums under the provisions of NAGPRA and the NMAIA. More specifically, three hundred and seventy (370) human remains and associated funerary objects came from the Nebraska State Historical Society; twenty eight human remains (including the remains of six U.S. Army Scout veterans) were from the National Museum of Natural History and National Museum of Health and Medicine (Department of Defense); and two human remains came from the American Museum of Natural History, located in New York.

— The human remains from the National Museum of Natural History (NMNH) were repatriated under the NMAIA as part of a claim that was initiated in 1988 and a portion of which is still pending, seven years later, on an appeal recently decided by the Smithsonian Institution's Native American Review Committee in the very first appeal before that Committee under the NMAIA. I wish to highly commend Dr. Russell Thornton and the Native American Review Committee for its timely, efficient and even handed treatment of our appeal and attach a copy of it's decision to illustrate the expense and complexity of repatriation claims under the NMAIA from the perspective of the Pawnee Tribe. The 372 remains from the other three museums were repatriated under NAGPRA.

All of the above efforts resulted in the reburial of the desecrated remains of tribal relatives in accordance with Pawnee traditions, which, of course, relieved great stresses among our people and afforded us with the respect and satisfaction of laying our dead to rest — which were foremost among Congress' goals when it enacted NAGPRA and the repatriation provisions of the NMAIA. However, achievement of these intended goals was

done only at great financial costs in the face of unnecessary delays and obstacles, which are discussed more below.

For example, just in the past 12 months alone, the Native American Rights Fund spent \$51,456.63 on attorney time, expert fees and travel expenses to repatriate the 28 human remains (including U.S. Army veterans) from the National Museum of Natural History and to win the attached appeal which is still pending at the Smithsonian under the NMAIA. Moreover, during the same period, NARF was also forced to expend \$2120,869.83 in legal, expert and travel costs to repatriate the 370 remains under NAGPRA from the Nebraska State Historical Society, the American Museum of Natural History and the National Museum of Health and Medicine. In addition, the Pawnee Tribe bore at least \$7,500 in costs and expenses associated with the actual repatriation and reburial of these 400 remains. Of these \$80,000.00 in costs, which are staggering to small Indian Tribes, the Pawnee Tribe was awarded a 1995 grant from the National Park Service of only \$7,500 to cover a part of the reburial expenses; and I just wonder how other Tribes are able to implement without access to NARF or other resources?

CONCERNs AND RECOMMENDATIONS.

Based upon the above experiences in implementing NAGPRA and the related federal repatriation provisions of the NMAIA, the Pawnee Tribe has experienced the following problems or concerns and offers accompanying recommendations for each:

1. LACK OF FEDERAL FUNDING:

The lack of federal funding seriously hampers tribal repatriation efforts. The Pawnee Tribe has applied unsuccessfully to the National Park Services for appropriate funding in the past but was denied. The sole funding received was the inadequate \$7,500 amount in 1995, for which we are extremely grateful in partial relief for the \$80,000 which was expended by NARF and our impoverished Tribe. For example, our Repatriation Committee estimates the need for at least \$70,000 per/year for staff, consultants and travel to implement potential NAGPRA claims, which we are presently unable to do. We are not alone. I understand from my attorneys that in FY 94 and FY 95 the National Park Service received 337 proposals from Tribes and museums totalling \$30 million dollars for NAGPRA implementation, but was only able to fund 83 grants for \$4.3 million, which leave a whopping \$25 million dollar gap.

This gap is likely to increase in the next 12 months due to the museum inventory deadline, which will spark increased NAGPRA implementation activities. Thus, it is clear that funding must be significantly increased to implement NAGPRA from the \$2.3 million dollars that is proposed at the present time.

RECOMMENDATION: Because even the best laws can be nullified by failure to fund necessary implementation measure, I strongly recommend full tribal funding for NAGPRA as originally intended when the law was developed and enacted, in the amount of 10 million dollars annually..

2. **LACK OF NAGPRA REGULATIONS:**

The unexplained failure of the Secretary of the Interior to promulgate regulations to implement NAGPRA by November 16, 1991, as required by 25 U.S.C. 3011 has contributed to confusion, delay and excessive costs for Tribes in implementing this law. For example, some of our delay and legal cost in repatriating the 370 remains from the Nebraska State Historical Society is attributed to confusion about the Secretary's powers and duties to publish museum notices of intent to repatriate in the Federal Register under 25 U.S.C. 3003(d). I understand that on the eve of this hearing the Secretary has or will publish the final rules in the Federal Register and our attorneys have not yet had the opportunity to review or analyze them.

RECOMMENDATION: We recommend that the Committee hold the record of this hearing open for a sufficient period in order to afford Tribes with the opportunity to offer the Committee their comments on the adequacy of the final regulations.

3. **EXCESSIVE MUSEUM DELAYS, STUDIES AND "DOCUMENTATION" CAUSES PROTRACTS TRIBAL CLAIMS AND INCREASES TRIBAL COSTS:**

The seven year old Pawnee repatriation claim against the Smithsonian's National Museum of Natural History, which is still pending under the NMALA, is a classic case of excessive delays, studies and "documentation" which has resulted in excessive tribal delays and costs (\$51,456.63) in NARF attorney time, expert costs and travel). In this case, it was common for months to pass before tribal letters were answered. The NMNH initially stated that it only had two Pawnee remains. Rather than accept this initial finding, the Tribe had to hire its own independent consultants (two historians, one archivist, an archeologist, NARF attorneys) who differed from the museum's experts. The Tribe's experts subsequently demonstrated that approximately 80 remains are properly subject to the Tribe's claim -- including six U.S. Army veterans, but only after

voluminous and expensive work in rebutting the many studies conducted by NMNH staff and consultants.

During the period, NMNH staff conducted radiocarbon studies of Pawnee remains housed on loan at the museum without seeking tribal consent or giving notice of this destructive and intrusive study. Outside consultants were hired by the museum without tribal notice or input who conducted voluminous studies without tribal involvement, including full-blown and unnecessary physical anthropological studies of the remains that entailed all sorts of measurements which were not pertinent to the claim.

After all these studies, the Tribe was still forced to take an appeal to resolve a dispute over a portion of its claim, which it ultimately won in the attached opinion. Had the Tribe accepted the initial museum assessment that only 2 Pawnee were in its collections, the Tribe would have left almost 78 ancestors to languish forever in museum vaults. It is clear to me that Indian Tribes must be well equipped with ample legal and expert resources to engage in protracted work with the NMNH or face the prospect of losing many culturally affiliated ancestors who should otherwise be repatriated to the Tribes under the NMAA.

RECOMMENDATIONS: The Committee should strongly encourage the NMNH and other museums with similar practices to:

- 1) refrain from excessive delays (which I define as more than 10 days after receipt of a letter from a Tribe) in corresponding with Indian Tribes.
- 2) refrain from conducting excessive, unduly expensive and time consuming new studies regarding repatriating claims, especially full blown anthropological studies under the guise of "documenting" or "inventorying" the remains at issue, unless requested or agreed to by the Tribe.
- 3) meet with Indian Tribes for the purpose of identifying better ways to streamline and expedite claims and make them less technical and expensive for Tribes, including improved consultation procedures.

Mr. Chairman and members of the Committee, this concludes my testimony. On behalf of the Pawnee people, please accept the gratitude of our Tribe for your past, present and future leadership in this important human rights issue. The Pawnee Tribe stands ready to assist the Committee in any way possible as it continues its review and assessment of federal repatriation issues. Thank you.

RECOMMENDATIONS REGARDING THE DISPUTE BETWEEN THE PAWNEE TRIBE
OF OKLAHOMA AND THE NATIONAL MUSEUM OF NATURAL HISTORY
REPATRIATION OFFICE OVER THE STEED-KISKER PHASE
HUMAN REMAINS AND FUNERARY OBJECTS

Submitted October 10, 1995 to Secretary I. Michael Heyman
by the Smithsonian Institution Repatriation Review Committee

Russell Thornton

Russell Thornton, Chair

Andrea C. Hunter

Andrea A. Hunter, Vice Chair

Roger Anyon

Roger Anyon

Lynne Goldstein

Lynne Goldstein

Christy G. Turner II

Christy G. Turner II

The Smithsonian Institution Repatriation Review Committee met at the Brown Palace Hotel in Denver, Colorado, on September 14, 1995, to consider the dispute between the Repatriation Office and the Pawnee Tribe of Oklahoma regarding the Steed-Kisker Phase human remains and funerary objects held at the National Museum of Natural History.

The remains and objects in question represent a minimum of fifty-three (53) individuals (in nineteen [19] sets) and one hundred and seventy-eight (178) funerary objects. They were obtained from three archaeological sites--the Steed-Kisker site itself, the Nolan C "mound" and the Shepherd "mound"--in Missouri during 1938 and 1939 by Waldo Wedel of the Smithsonian Institution. The Steed-Kisker Phase dates from about A.D. 1000 to about A.D. 1250.

The dispute between the Pawnee Tribe of Oklahoma and the Repatriation Office concerned the cultural affiliation of the Steed-Kisker Phase human remains and funerary objects. The Pawnee Tribe had requested repatriation of the human remains and funerary objects based on the belief that a preponderance of available evidence indicated that the Steed-Kisker Phase is culturally affiliated with the Central Plains Tradition and the Pawnee Tribe. The Repatriation Office disagreed with the Pawnee Tribe based on the belief that the Steed-Kisker Phase could not be assigned a cultural affiliation until further studies were conducted.

The Pawnee Tribe was represented by Walter Echo-Hawk, of the Native American Rights Fund and the attorney for the Pawnee Tribe; Roger Echo-Hawk, a consultant for the Native American Rights Fund and the Pawnee Tribe; Charles Lonechief, Chairman of the Pawnee Repatriation Committee and member of the Business Council of the Pawnee Tribe; and Vance Horsechief, a member of the Pawnee Tribe Repatriation Committee. The Repatriation Office was represented by Thomas Killion, Director; William Billeck, case officer; and Lauryn Grant, attorney for the Smithsonian, representing the Repatriation Office. The Repatriation Review Committee was represented by all five members--Roger Anyon, Lynne Goldstein, Andrea Hunter, Russell Thornton and Christy Turner--as well as Gillian Flynn, Repatriation Review Committee coordinator.

The Committee met with Pawnee and Repatriation Office representatives from approximately 9:00 A.M. to 12 noon and from approximately 1:00 P.M. to 3:00 P.M. During this period, oral summaries were presented by both sides and both sides responded to inquiries posed by individual Committee members. The Committee then met in an in camera session from approximately 3:00 P.M. to 5:00 P.M. During this period, we assessed existing evidence as presented orally and in previous written documentation. Based on this evidence, we formed conclusions regarding the cultural affiliation of the Steed-Kisker Phase. We then formulated three recommendations to Secretary Heyman (via Provost Hoffmann) regarding repatriation of the Steed-Kisker Phase human remains and objects. Our recommendations were unanimous and consensual.

Recommendation One

The Repatriation Review Committee unanimously recommends that the Steed-Kisker Phase human remains and funerary objects be repatriated to the Pawnee Tribe of Oklahoma.

The Committee concludes that a preponderance of the existing evidence indicates a cultural affiliation of the Steed-Kisker Phase with the Central Plains Tradition. The Central Plains Tradition has been previously shown to be affiliated with the contemporary Pawnee, as represented by the Pawnee Tribe of Oklahoma. (Such other contemporary groups as the Arikara of the Three Affiliated Tribes of the Fort Berthold Reservation and the Wichita and Affiliated Tribes are also affiliated with the Central Plains Tradition.) We conclude that evidence derived from house-type, settlement pattern, geographic location, and oral traditions indicate a cultural affiliation of the Steed-Kisker Phase with the Central Plains Tradition and the Pawnee. We conclude that ceramic evidence indicates a probable cultural affiliation other than the Central Plains Tradition for the Steed-Kisker Phase. We conclude that it is not possible to establish any specific cultural affiliation for the Steed-Kisker Phase using available evidence derived from biological data, mortuary practices, subsistence, or tools. Thus, of the nine types of existing evidence examined, data from four indicate an affiliation with the Central Plains Tradition, data from one indicates an affiliation other than the Central Plains Tradition, and data from four are inconclusive in establishing affiliation. This is a clear preponderance of the

evidence in favor of a Central Plains Tradition cultural affiliation for the Steed-Kisker Phase.

The existing evidence we examined and our assessment of it are presented in detail below.

Ceramics

Ceramics of the Steed-Kisker Phase are, for the most part, shell tempered, have sunburst designs on their shoulders, and are jars with low rims, in contrast to Central Plains Tradition ceramics that are mostly grit tempered, rarely have designs on their collars, and are predominantly low to high rimmed with thickened lips that are referred to as collars. Although the shell temper, the designs, and the shape of Steed-Kisker ceramics are, on the whole, much more like Middle Mississippian than Central Plains Tradition ceramics, some Steed-Kisker ceramics are grit tempered, and no Steed-Kisker ceramics have been found at Cahokia. Some shell tempered ceramics have occasionally been found on Central Plains Tradition sites, however. Even so, because the technological and stylistic differences between Steed-Kisker Phase and Central Plains Tradition ceramics are readily apparent in the vast majority of the excavated ceramics, the Committee believes that ceramics in the Steed-Kisker Phase are indicative of cultural affiliation with groups other than the Central Plains Tradition.

Geographical Location

Steed-Kisker Phase human remains and funerary objects at the

National Museum of Natural History were obtained from three locales: the so-called Steed-Kisker site itself, the Nolan C "mound," and the Shepard "mound," all in present-day northwest Missouri, along the Missouri River and its tributaries. Other identified Steed-Kisker Phase sites are located to the north, south, east and west (across the Missouri River in Kansas) of the three locales. This area lies roughly between the cities of Kansas City and St. Joseph, Missouri. The locations of the various phases of the Central Plains Tradition--the Itskari, Nebraska, Smoky Hill, St. Helena and Upper Republican--are to the north and west of this geographic area. The location of the Nebraska Phase of the Central Plains Tradition is along the Missouri River, extending south of St. Joseph to the Sugar Creek Ossuary. Sites in this specific area--Sugar Creek and Cloverdale--may be classified as Nebraskan Phase, but contain clear elements of Steed-Kisker Phase as well. Thus there is actual geographical overlap between the Nebraska Phase and the Steed-Kisker Phase in the area to the south of present-day St. Joseph, Missouri. The Committee acknowledges this geographical proximity, adjacency and even overlap as important evidence indicating an affiliation of the Steed-Kisker Phase with the Nebraska Phase of the Central Plains Tradition.

House Form

Steed-Kisker Phase house forms are variable, as evidenced by the presence of earthlodges with four interior support posts, rectangular houses with four post roofing systems, a square

ceremonial structure, and a partial wall trench house. The diagnostic type house form, used by archaeologists as a taxonomically identifying feature of the Steed-Kisker Phase, is the rectangular four interior post structure. Even though some authors have attributed this style to Middle Mississippian cultures, the four interior post earthlodge is characteristic of the Central Plains Tradition, and wall trench structures are more clearly associated with the Middle Mississippian culture. Excavated Steed-Kisker Phase structures total ten: six rectangular houses, two earthlodges, one (possible) ceremonial structure, and one partial wall trench house. Given the clear presence of Central Plains Tradition-style earthlodges and rectangular structures in the excavated archaeological record of Steed-Kisker Phase sites, the Committee believes that the preponderance of house-form evidence in the Steed-Kisker Phase suggests a cultural affiliation with the Central Plains Tradition.

Mortuary Practices

Mortuary data for the Steed-Kisker Phase are incomplete, with few detailed records.

The Repatriation Office outlines two primary pieces of evidence regarding mortuary practices at the Steed-Kisker Phase site cemetery: one, most burials are in an extended position; and, two, cemeteries were laid out in semi-circular rows. Both patterns are reminiscent of Middle Mississippian Tradition cemeteries in Illinois, with neither pattern similar to the Central Plains

Tradition. Although we do not question this observation, the patterning at the Steed-Kisker Phase site was not compared to the within-site pattern at Central Plains Tradition sites.

Conversely, the Pawnee argue that the lack of status differentiation in the cemetery is more representative of the Central Plains Tradition than of societies of the Middle Mississippian Tradition. The Pawnee note also that extended burials have been found in Central Plains Tradition sites, even though most Central Plains Tradition cemeteries are ossuaries. Furthermore, ossuaries are a secondary disposal practice, and bundle burials which represent such practices have been found at Steed-Kisker Phase sites. These observations are also correct; however, Mississippian Tradition cemeteries associated with small villages often have little status differentiation, and secondary disposal practices were common in Mississippian Tradition societies. Furthermore, the lack of detailed descriptions for both Steed-Kisker Phase and Central Plains Tradition cemeteries makes detailed within-site comparisons impossible.

Extended burials, secondary disposal of the dead, cemeteries, and lack of status differentiation do not, therefore, suggest one affiliation over another. (More analysis and more detailed examination of the within-site patterning of mortuary sites would be needed to do so.) The Committee concludes that the significant variability in mortuary practices by many groups during the time period in question makes it difficult to assess the existing mortuary data as indicating the affiliation of the Steed-Kisker

Phase with one tradition over another.

Oral Traditions

Oral traditions presented in the Pawnee Tribe's response to the National Museum of Natural History's report on the Steed-Kisker Phase and at the Repatriation Review Committee's hearing in Denver were extremely important and very helpful in interpreting the archaeological record. The oral traditions indicate two major Caddoan groups within the Steed-Kisker Phase which are ancestral to contemporary groups, some becoming Arikara (from the west side of the Missouri River [represented by the Calovich site]), others becoming Pawnee (from the east side of the Missouri River). The oral traditions also indicate the formation of the Pawnee out of diverse peoples. For example, the Skidi Pawnee scholar James R. Murie recounts Pawnee oral traditions of the South Band Pawnees--the Pitahawirata, the Chauí and the Kitkahahki--indicating ancestors--the Kawarakis--who lived in the Nemaha region of southeastern Nebraska (the area of the Nebraska Phase of the Central Plains Tradition). These traditions indicate also that a group ancestral to the Kitkahahki moved south, out of the Nemaha region. This migration seems to have been to the Steed-Kisker Phase area east of the Missouri River, with the Sugar Creek Ossuary being a possible cemetery site. Oral traditions also indicate origins from the American Bottom, around Cahokia at the junction of the Missouri and Mississippi Rivers, for the other Pawnee bands. The Committee finds the oral traditions presented to offer a

compelling argument linking the Steed-Kisker Phase to the Central Plains Tradition and contemporary Pawnee (and Arikara), particularly when used in conjunction with the archaeological evidence.

Physical Anthropological Evidence

The craniological (metric and non-metric) studies that were involved in the Steed-Kisker Phase repatriation case are either inadequate to the issue at hand, or they are methodologically flawed for identifying affiliation in any statistically significant manner, or even with the unscientific preponderance of evidence criterion. With respect to inadequacy, no assessments were made for the biological affinity of populations to the east of the Steed-Kisker Phase sites, namely Cahokian and Cahokian-outliers. This should have been done since these populations have been long linked on ceramic grounds with the Steed-Kisker Phase, and should have been included in the matrix for affinity assessment.:

As for being methodologically flawed, Steed-Kisker Phase sites yielded only two measurable crania. There is no known statistical procedure that could have made a meaningful affinity assessment, given the probable variance in Plains cranial measurements and non-metric features. Moreover, the amount of environmental influence on cranial variation in the Plains has never been estimated. It is well known that within-group body and cranial dimensions change to some degree through time with changes in diet and other factors. This sort of secular change has been well documented in other

groups. Plains groups could be craniological similar due to similarities in their environments during cranial growth and development, rather than being similar due to very similar genetic backgrounds. The latter could have been estimated using dental morphology. In sum, the craniological data do not support the Pawnee case, nor do they support the Repatriation Office. These data are, for the present, inadequate and therefore irrelevant.

Settlement Patterns

Settlement data include kinds of sites and site locations in relation to one another and to the landscape. While it is true that the dispersed settlement patterns reported for the Steed-Kisker Phase area more closely resemble a Central Plains Tradition pattern than a Middle Mississippian Tradition pattern, it is also true that no one has conducted systematic archaeological surveys in the Steed-Kisker Phase region. Because no systematic or even widespread surveys have been done, it is not possible to make an informed conclusion about settlement patterning in general. Nonetheless, there is evidence for one kind of site that does support a Central Plains Tradition affiliation over a Mississippian Tradition one for the Steed-Kisker Phase: platform or pyramidal mounds have not been found in the Steed-Kisker Phase area or at Steed-Kisker Phase sites. Since such mounds are commonly and usually associated with Middle Mississippian Tradition settlements, the lack of these mounds is both notable and significant. Although it is true that no systematic archaeological surveys have been

conducted, it is very common for most mound sites to be known. Platform mounds are visible, were regularly recorded by Euro-American settlers and by both amateur and professional archaeologists, and were a major focus of investigative activity in the late 19th and early 20th centuries. While we would not be surprised if several mounds or mound groups in a region were missed, we note that if there were platform mounds in the region, it would be extraordinary to have had none reported at all. Since several specific Steed-Kisker Phase sites have been excavated and no evidence of platform mounds documented, it must be concluded that, to some degree the lack of these mounds reflects what was actually present. This represents a pattern more likely expected in Central Plains Tradition settlements. Thus, settlement data favor a Central Plains Tradition affiliation over a Middle Mississippian affiliation for the Steed-Kisker Phase in this respect.

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Subsistence

The subsistence economy of the Steed-Kisker Phase is in accordance with the general horticultural/agricultural strategies practiced by cultures utilizing plains and woodland environments. Early investigations of archaeobotanical remains from Steed-Kisker Phase sites report the presence of Zea mays (corn), Helianthus annuus (sunflower), Cucurbita pepo (squash), Juglans nigra (black walnut), Carya sp. (hickory nut), Corylus americana (hazelnut), and Carya illinoensis (pecan). More recent studies have included

fragments of Phaseolus vulgaris (common bean) from Steed-Kisker Phase sites. The presence of P. vulgaris has been discovered at Central Plains Tradition sites, but not at Cahokia. This has been suggested as evidence for shared group identity between the Steed-Kisker Phase and the Central Plains Tradition. However, the similarities in subsistence patterns between the two is really a result of successfully adapting to a similar environment. P. vulgaris fragments have been recovered from contemporaneous Mississippian Tradition sites (Olin and Hill Creek) in Illinois, as well as Oneota Tradition sites in Missouri, Illinois, Wisconsin, and Iowa. Subsistence is thus of no use in determining differential affiliation between the Steed-Kisker Phase and Central Plains, Mississippian and Oneota Traditions.

Tools

Bone tools from Steed-Kisker Phase sites include awls made from deer ulna fragments, worked deer mandibles and various worked antler fragments. Such bone tools have been recovered from Central Plains, Middle Missouri, Middle Mississippian and Oneota Tradition sites. Therefore, they are of no diagnostic use here.

Stone tools from the Steed-Kisker Phase include both flaked artifacts (e.g., projectile points, knives, scrapers and drills) and ground stone artifacts (e.g., abrading stones and disk fragments). Projectile points described by Wedel are similar in form to Huffaker, Harrell, and Cahokia projectile points. Huffaker points are found throughout the Plains from Oklahoma northward to

the Dakotas and as far east as Illinois. The suggested age range is from A.D. 1000 to A.D. 1500. Harrell points are widely distributed in the Great Plains from northern Texas to Canada to east to the Mississippi River valley to west to southwestern and northwestern states. The suggested age range is from A.D. 1100 to A.D. 1500. This point type is similar to, if not identical with, the Cahokia point of the Mississippi River valley. The Cahokia point is found in Illinois, Iowa, Wisconsin, Missouri, northern Arkansas and eastern Oklahoma. These points are found in most Mississippian affiliated sites along the Mississippi River and along Caddo-Mississippian trade routes. The Cahokia point ranges in age from Early to Late Mississippian, first occurring around A.D. 900.

The knives from Steed-Kisker Phase are generally ovoid in shape or retouched chipped flakes and spalls. Scrapers are described as of common snub-nosed or plano-convex types. All of these flaked stone and ground stone artifact types have been recovered from Central Plains, Middle Missouri, Middle Mississippian and Oneota Tradition sites. Thus, they, too, are not useful in locating the Steed-Kisker Phase in one of the traditions.

Recommendation Two

The Committee recommends that reasonable expenses involved in the actual return of the Steed-Kisker Phase human remains and funerary objects be covered by funds allocated to the Repatriation Office for repatriation purposes.

The Committee assumes that the Pawnee Tribe of Oklahoma has encountered some financial expenses in bringing their appeal to the Repatriation Review Committee. Consequently, we wish to have the repatriation of these human remains and objects take place without any additional undue financial burden to the Pawnee Tribe.

Recommendation Three

The Committee recommends that a letter stating an intent to repatriate Steed-Kisker Phase human remains and funerary objects to the Pawnee Tribe of Oklahoma be sent to the approximately one dozen contemporary American Indian tribes that may be potentially affiliated with the Steed-Kisker Phase (as determined by the Repatriation Office), and that these tribes be given a sixty-day (60-day) opportunity to make a claim for the Steed-Kisker Phase human remains and objects and to provide supporting evidence to the Repatriation Office.

The Committee notes that cultural affiliation of the Steed-Kisker Phase with traditions other than the Central Plains Tradition and with contemporary American Indian peoples other than the Pawnee (and the Arikara and Wichita, whom the Pawnee have represented in other disputes) are possible. The Committee also notes that National Museum of Natural History Repatriation Office guidelines specify notification of all parties with a potential interest in human remains and objects that are being considered for repatriation. This notification may be through newspapers, newsletters and other news media. In this instance, a letter sent directly to relevant tribes is also appropriate. The Committee stands ready to assist the Repatriation Office by reviewing the letter before it is sent, and by assisting in the resolution of any disputes which might arise.

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December 10, 1995

Senator John McCain, Chair
 Senate Committee on Indian Affairs
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 Washington, D.C. 20510

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Dear Senator McCain,

I would like to submit the following testimony to your December 6, 1995 Committee hearing on repatriation.

The clear intent of the NAGPRA is to repatriate as broadly as possibly to the American Indian community. Sec. 2(7) defines "tribe" as any community or group that is "eligible for the special programs and services provided by the United States to Indians because of their status of Indians." This intent is obstructed by the imposition, in the 1993 Regulations, of the definition of "tribes" as those groups having received formal recognition by the BIA. We strongly urge you to amend the proposed rules to reflect the original intent of NAGPRA to include the service population of Indians, as generally defined in the Snyder Act of 1921. The Snyder Act is used by many Federal agencies, for example, the Indian Health Service of the Department of Health and Human Services, (IHS), as the criterion for a definition of membership in Indian tribes and groups.

Given the specific historical circumstances of California Indians relations with the Federal government (namely the existence of 18 treaties which promised over 8 million acres to California Indians, signed in 1852 by tribal representatives and Federal agents, but never ratified by Congress), the intent of NAGPRA will not be served in California by the imposition of the BIA definition of tribes and groups. The IHS promulgated expansive criteria for California Indians in 1988 amendments to the Indian Health Care Improvement Act of 1980. In those amendments, Congress defined eligible "California Indians" to include members of federally recognized tribes, holders of trust allotments, and distributees under the California Indian land settlement and their descendants, regardless of their geographic residence within the state. The IHS calculated the service population of California Indians in 1991 at 88,675; the BIA calculation for the same year was only 36,511. The IHS has been authorized to designate states, counties, and towns as "Health Service Delivery Areas," rather than reservations, where reservations are nonexistent or so small and scattered and the eligible Indian populations widely dispersed that it is inappropriate to use reservations as the basis of defining the Health Service Delivery Areas.

Using the criterion of membership in Federally recognized tribes disproportional disadvantages California, which has the largest percentage of Indians from unacknowledged tribes in the nation. Many, or perhaps most, unacknowledged California Indians are descended from individuals who were on the judgment roles for land claims cases involving the 1852 treaties with California Tribes. Although these individuals have one or more forms of federal certification of their status as Indians, they are not eligible for BIA benefits under contemporary standards because their tribal groups are not acknowledged. Likewise, this excluded population is not benefiting from

NAGPRA; remains and cultural artifacts from virtually every county of California are being determined to be affiliated with tribal populations presently representing only a small fraction of the indigenous social and geographical areas of the state.

Only by using the broader service population definition of Indian tribes and groups will repatriation be carried out fairly according the intent of NAGPRA. The service population definition is legal and consistent with the policies of other Federal agencies, and will be more inclusive and just. Importantly, the service population criteria will avoid the legal entanglements that will certainly arise as a result of the BIA tribal recognition stipulation in the Regulations.

The imposition of BIA criterion of recognized tribes has seriously distorted the process of determining cultural affiliation. Therefore, in addition to redressing the problem of defining the Indian populations having standing under NAGPRA, we urge you to address the related problem of determining cultural affiliation. The statistics of the IHS, California State agencies, as well as ethnographic consultation, have clearly demonstrated that many Indian families belonging to unacknowledged groups in California still reside in or near their traditional locales, and still have strong social and familial associations with those locales. The affiliation with a specific locale is often ethnographically unrecognized, or if recognized, overridden by accepted anthropological designations of cultural affiliations. The self-identification of cultural affiliation on the part of indigenous Californians exists as mutually recognized geographical and genealogical contiguities. Many Indian people are currently being cut out of the repatriation process, not only because they are not members of formally recognized tribes, but also because their own definitions of cultural affiliation do not accord with those of scholarly ethnography and archaeology.

For example, the term "Chumash" derives from self-identification of the people living on Santa Cruz Island, which has been applied to apparently linguistically and culturally related ecological locales, or "provinces". We know that the dialects spoken in these ecological regions within Chumash territory were very distinct, possibly, some linguists believe, mutually unintelligible. Within the cultural area known as "Chumash" to anthropologists, there are seven distinct, self-identified socio-cultural groups. "Cultural affiliation" for many "Chumash" individuals is not what anthropologists and archaeologists understand as the similarity of "Chumash" material cultural traits, rather their ethnic and cultural identity is more complex network of genealogical, historical and social associations which are fundamentally underlain by a powerful contiguity with a specific locale, or ecological region. Some indigenous individuals living in "Chumash" territory prefer to call themselves by their regional names, most strongly identify with regional lineages. These strong aspects of geographical contiguity in the self-definition of ethnicity are often overlooked by anthropologists who for the sake of convenience, and because of historical contingencies, use both too broad categories of cultural affiliation and too narrow categories of genealogical links, negating intimate, important cultural affiliations with locales and the historical, social persistence of familial and clan level affiliations. Much of the evidence of the persistence of ethnic/cultural affiliations are in the form of oral histories which are not explicitly "cultural" in content, but recount continued, often seemingly informal, social associations of families in the generations since contact. Also, the geographic boundaries of the locales - watersheds and topographical features - can be described by many consultants in very minute detail. This knowledge is sometimes attributed by anthropologists to contemporary cultural resource management strategies. However, in many locales elders not involved in cultural resource matters have similar knowledge, and also share convictions about the importance of extended families and locale in determining cultural affiliation.

Under the current NAGPRA law, remains from any ecological locale in the "Chumash" cultural area determined to be affiliated with "Chumash" culture would be repatriated to the Santa Ynez "Chumash", the only band having a reservation and Federal recognition. The Santa Ynez reservation represents a small fraction of the total "Chumash" population, (roughly two hundred individuals on the reservation out of several thousand total). While individuals from many "Chumash" clans live, or have lived, on the reservation, the larger Santa Ynez area itself represents one of several distinct "Chumash" regions, overlapping with the reservation in complex ways. There is an implicit, and sometimes explicit, acknowledgment on the part of individuals on the Santa Ynez reservation that human remains from other locales properly fall under the jurisdiction of the families associated with those locales, yet the Santa Ynez "tribe" currently has the final say in the disposition of the remains, and other bands of "Chumash" are completely dependent on the present good will of the Santa Ynez for the recognition of their own wishes concerning the return of their ancestors taken from other regions. Analogous, but even less fortunate, situations exist in other places in California.

The inverse of the "Chumash" situation is that of the Luiseno where one "tribe" is represented by several different reservations. Each reservation considers themselves to constitute a Luiseno band. The socio-cultural affiliation of each reservation tribal council is based on specific ancestral, familial territories larger than the reservations themselves. Specific Luiseno bands apparently have no interest in the repatriation of remains from the territories of other Luiseno bands. UCLA will presumably consider repatriating specific remains to one of the Luiseno bands/reservation claimants, Pechanga, rather than the "tribe" itself, even though cultural affiliation will probably be determined as "Luiseno" for lack of any more specific ethnographic designation. There is not now, and was not ethnohistorically, any overarching political or social organization representing a Luiseno "tribe", even though the Luiseno bands shared very similar linguistic dialects, and share a common designation derived from the Spanish mission at San Luis Rey. Different historical circumstances combined with the BIA criteria of the NAGPRA regulations have created the illusion of a single, overarching "Chumash" tribal entity/cultural affiliation, making repatriation a quite different process there than it is in Luiseno territory.

Dealing with the determination of cultural affiliation on the level of locale and families rather than "tribes" will make the process of repatriation more feasible and less contentious, as well as more accurate and just. For example, remains from the Los Angeles basin can potentially be claimed by Gabrielino/Tongva individuals from five or six separate Gabrielino/Tongva communities. Under the current proposed regulations, remains from the Los Angeles basin determined to be associated with the Gabrielino/Tongva are culturally "unidentifiable", with the possibility of repatriation to the unrecognized Gabrielino Tribal Council based in San Gabriel (but not to specific families or communities), or on the principle being used in "Chumash" territory, to the Luiseno as BIA-recognized Takic speakers of a similar Uto-Aztecan dialect. (Gabrielino and Luiseno dialects may have had the same or greater degree of intelligibility than some of the closer "Chumash" dialects.) Most Luiseno and Gabrielino/Tongva individuals find neither of these possibilities a satisfactory resolution for repatriation, rather they recognize and prefer the protocol of affiliation based on locale.

Instead of viewing the Gabrielino communities as "factions" which need to form a consensus before repatriation can occur (a virtual impossibility, according to some), we can view these communities as bands of Gabrielinos in the same way Luiseno individuals identify five bands and "Chumash" seven. Gabrielino communities are also groups of families, associated with specific locales, and the cultural affiliation of specific remains could be determined accordingly. The imposition of a

tribal name upon geographically widespread "Gabrielino" communities may fit a handbook definition of cultural affiliation, but does not reflect the persistence of more diverse social and geographical ethnic self-identifications. Not surprisingly, this self-identification is the most likely basis of consensus for all of the involved parties.

As a final example of the unnecessary difficulties caused by both BIA tribal recognition criteria and the implicit ethnographic assumptions about cultural affiliation, there is an individual who is claiming cultural affiliation with an heretofore unrecognized, unnamed Southern Channel Island ethnicity. This individual is enrolled as both a Luiseno and Gabrielino/Tongva. He claims, and most archaeologists and ethnographers agree, that the Island people formed a separate ethnicity while intermarrying with both Luiseno and Gabrielino people. He also claims that some Island people survived and have remembered their Island ethnicity on the mainland over the last 150 years, and that his elderly ancestors substantiate this claim. However, this individual and his relatives, even as enrolled members of recognized and unrecognized Indian groups, presently have no standing under NAGPRA. His claim is a critically important one given the magnitude of archeological collections from the Southern Channel Islands. His oral history has met initially with mild to extreme skepticism from anthropologists who have a knowledge of the ethnohistorical records of the coastal areas. But his testimony also potentially contributes to the evidence for the persistence of regional affiliations, and reciprocally, if the importance of Native understandings of regional contiguity are taken into serious consideration in the consultation process in NAGPRA, this testimony could be sympathetically received, given its due weight as evidence, and potentially substantiated by ethnohistorical research.

NAGPRA clearly states that expert opinion and Native testimony will be given equal weight in determination of cultural affiliation. If Native testimony and scholarly evidence are truly to be given equal weight, Native testimony has to be judged on its own terms, and not on implicit, prior scholarly presumptions about how cultural affiliation will be defined. The evidence shows that cultural affiliation is maintained in Southern California (and I strongly suspect elsewhere as well), on a level much more minute and diverse than that recorded in the ethnographic record, and that these cultural affiliations with very specific and regional locals have persisted against great odds for the last several hundred years.

The difference between Native testimony and scholarly documentation is often cast as the difference between "science" and "religion". Native testimony does not only represent different spiritual beliefs, but also represents different *intellectual theories* about cultural affiliation. Academic definitions of cultural affiliation represent different, but not inherently more empirical, understandings of cultural affiliation. Objectivity concerning cultural affiliation can be rendered only within an inclusive field of knowledge. This is especially the case for the cross-cultural cooperation required by NAGPRA.

The negotiation of a consistent, inclusive definition of cultural affiliation is a difficult task, but one which should not be avoided any longer. The interpretation of the implicit intent of NAGPRA rests on the definition of "cultural affiliation". *If the expressed goal of NAGPRA is to involve local Native participation in the repatriation process on an equal basis with NAGPRA institutions and expert opinions, the Review Committee should explicitly define "cultural affiliation" by including specific Native understandings of "cultural affiliation."* Obviously, this should be done in conjunction with Native consultation, and should draw on what has been learned in the nationwide consultation process for the NAGPRA Inventory and in the Review Committee hearings. This

would be a significant step toward making repatriation a fairly negotiated process, and would also contribute substantially to the cross-cultural pursuit of intellectual knowledge.

The determination of cultural affiliation on terms other than those of BIA tribal recognition will avoid the potential legal entanglement of NAGPRA institutions from federally unrecognized claimants, both immediately and in the future. The descendants of indigenous people of this state persist in knowing who they are, where they belong, and what belongs to them; imposing tribal entities and boundaries that violently cut across their contiguous cultural affiliations will probably not go uncontested.

Sincerely,



Duane Champagne
Director, American Indian Studies Center

TESTIMONY REGARDING PROCEDURES TO IMPLEMENT NAGPRA
PUBLIC LAW 101-601
SUBMITTED TO THE SENATE COMMITTEE ON INDIAN AFFAIRS

By Darrell Drapeau, Chairman, Greg Bourland, Secretary,
Dakota Territory Chairmans Council
December 18, 1995

Chairman McCain and Members of the Committee, thank you for giving us the opportunity to comment on the procedures to implement the Native American Graves Protection and Repatriation Act, Public Law 101-601, commonly referred to as the NAGPRA. The Dakota Territory Chairmans Council has instructed Darrell Drapeau, Chairman of the Yankton Sioux Tribe, and myself, Greg Bourland, Secretary of the Council and Chairman of the Cheyenne River Sioux Tribe, to submit the following testimony about this very important Act on behalf of the Dakota Area Tribes. Our council was formed by our respective tribal governments to establish a strong and unified voice among the tribal leadership, which in turn represents tens of thousands of enrolled members. We have been closely following the work of the North Dakota Intertribal Reinternment Committee and today wish to submit testimony which supports the issues they have been raising with the regulatory process to implement the NAGPRA.

Since the appointment of the NAGPRA Review Committee, we have had serious concerns regarding the implementation of NAGPRA and have followed the process closely. Although Assistant Secretary Ada Deer gave us her written promise that she would not sign off on the proposed final regulations until such time that they were published again and received another public comment period, she did not keep her promise. We were told by her staff that she was "pressured" into signing off on them only a short while before the Oversight Hearing, scheduled to investigate our problems with them, was held. Because of this, we are faced with the very grave decision of looking to the courts for relief. Members of the Committee, we do not undertake this decision lightly, but before we are forced to act upon it, it may be that you can do something to ameliorate the serious concerns we raise before you now.

Before we go any further, however, we are compelled to refer to a directive given by President William Clinton over two years ago. In this Executive Proclamation on Indian Affairs, President Clinton stated, "The United States is bound by a special trust relationship, requiring the Congress, the President, and all entities of the federal government to assure that the 'good faith shall always be observed toward the Indians,' as provided for in the North West Ordinance of 1781 legal documents shall be interpreted liberally in favor of the tribes and as the tribes would have understood them." Further, "The United States shall forever continue to respect and protect the government-to-government relationship with American Indians and Alaskan Native tribes, a relationship principle that historically has been a cornerstone of this nation's official Indian policy" and finally, "The United States shall support and assist American Indian and Alaskan Native tribes in exercising broad sovereign tribal authority over all places, persons, property and even with their territorial jurisdiction..."

Senators, we submit that the final regulations, as currently written, redefine Indian tribes, Indian sovereignty, and Indian policy. In our review, the problems inherent in the final regulations represent a major Indian policy change successfully conducted through the regulatory process.

Chairman McCain and Members of the Committee, from the many letters our tribes have written each of you, you are all well aware of the serious issues we have raised surrounding the regulatory process. We maintain that tribes were not represented, had little opportunity for input, and the issues we did manage to raise were ignored. The law, through regulatory language, has been gutted of its protection to tribes. More than that, major Indian policy changes have successfully been manipulated through the regulatory process. We are gravely concerned, and we are outraged that nothing was done about our concerns when changes to the regulations could have been made through a second publication and comment period that we have been seeking for nearly two years. When our requests for an Oversight Hearing were finally honored, however, the regulations were "hustled" into the final stage, thus ensuring that once again, Indian people will have to live with a law that does not protect our interests, does not do what Congress promised it would do for us, and forces us to the courts to protect our rights and that of our deceased ancestors.

Chairman McCain and Members of the Committee, we want you to see what it is tribes will have to live with, now that reinterpretations of the law have been finalized in the regulations.

- * The regulatory definition of tribal lands strips tribes of their right to exert jurisdiction over any and all persons and lands within their exterior boundaries. This reinterpretation will create serious problems for those tribes who have fee patent lands within their boundaries and is in direct violation of current Indian policy and the Act itself. Again, we refer you to President Clinton's Executive Proclamation on Indian Affairs to see for yourselves where Secretary Babbit, in finalizing this version of regulations, failed to extend good faith and insure the federal government's trust responsibilities to tribes.
- * The regulatory definitions of "possession" and "control" reinterpret language which was meant to act as a protective device for insuring that the temporary possession of items by museums did not result in an illegal transfer, but they have now been changed to mean "have a legal interest in". This reinterpretation of the Act will have far reaching, negative effects for tribes, because we must now, in addition to proving that we are related to our dead relatives, also prove that the museum has no "legal interest" in them. Who, besides their descendants, could be said to have a "legal interest" in our dead? In our view, this unethical reinterpretation establishes the concept of "ownership" of our dead, their personal belongings, and our sacred property. We submit that this is something Congress did not intend when NAGPRA was passed. Because no one listened to us, however, we tribes will have to live with this "theft by regulation" until we can produce the uncertainties for tribes. We further submit that we did not support and work hard for the passage of NAGPRA so that we could bring home our dead relatives and sacred property by way of courts, we worked hard for this law because we were told it would keep us out of court.

- * Statutory language is silent regarding the repatriation of human remains incorporated into other cultural items, such as a war shirt decorated with human scalps. The law has not been interpreted liberally in favor of the tribes nor as we would have understood it, as accepted Indian policy requires. The final rule ignores our values about our own property, which should inform all decisions about repatriation, and as a result, the regulations prevent the repatriation of human remains incorporated into other items. This is an excellent example of how many decisions were made without the input of tribal leaders, who would have prevented this misinterpretation of the law and provided protection for our interests, given the opportunity.
- * Several key determinations, such as whether or not an item is sacred or whether or not human remains are affiliated with a particular group, have been left to the museum and science industries, our most vocal opponents in repatriation. In the event that tribes disagree with a museum's decision, their only recourse after informal negotiations is to go to court. Once again, we submit that we did not participate in the passage of this law only to find ourselves in court, year after year, in order to bring our relatives and sacred property home. Moreover, had the tribes been granted more access to the regulatory process itself, we could have offered our expertise and guidance on matters that are more property within our purview than that of museums': we are the experts on our relatives and sacred property, not the museums, yet our knowledge and expertise have been effectively excluded from the realm of decision making - we are only allowed a consultation after museums have made their decision. Finally, federal agencies and museums have seemingly endless resources to support a legal defense in the event a tribe disputes their decision, however, that is not the case with impoverished tribal governments who are having trouble funding life-and-death initiatives back home, such as preventing elders from freezing to death by providing the minimum standard of housing. This places the tribes at a unfair advantage. Senators, when all museums have to do is say "No", and tribes have to decide between bringing a lawsuit or watching tribal members join the ranks of the homeless.
- * Discussions at the Oversight Hearing of December 6, 1995 included proposed amendments to the Act. In addition, there are several sections of the Act for which proposed regulations were placed in "Reserved" status, and announcements have been made that these proposed regulations will soon be published in the Federal Register. Developing amendments to the Act and proposed regulations for the Reserved Sections are two important opportunities available to the Senate Committee to insure improved tribal participation and protection of our rights. Chairman McCain and Members of the Committee, the Dakota Territory Chairmans Council hereby officially requests that you direct Secretary Babbitt to include coalitions of regional, tribal NAGPRA representatives in all deliberations regarding amendments to the Act and proposed regulatory language for the Reserved Sections. Had such an attempt been made with the Final Regulations before us today, we would not have to be writing to you to complain about the serious problems in those regulations. A directive from your committee, we feel, will be highly effective in assuring that tribes are not again left out of the loop in these important deliberations, and will also insure that discussions are carried out for the purpose of creating consensus, and not protecting the interest of the science and museum industries, which will in turn enable this most important Act to do what it was intended to do.

* The problems with the regulatory process to implement the NAGPRA are not new : the near-total lack of tribal input, representation and ability to protect our sovereign rights is a struggle we have lived with for over five hundred years. Therefore, the Dakota Tribal Chairman's Council hereby officially requests that the Senate Committee on Indian Affairs begin negotiations with ours and other intertribal councils to develop legislation to create a new method whereby consensus and meaningful representation of tribes can be included in all proposed regulatory language written to implement laws affecting Indian tribes. Our problems will change only when the system changes, and not before.

Chairman McCain and members of the Committee, we are grateful to you for the opportunity to present our views and problems for your consideration and action. Please accept this testimony in the spirit in which it was given -- we only want the law to do what it was intended to do, and that is to bring home all of our relatives, all of their personal burial belongings, and all of our sacred and cultural property. You can see that we are not asking for anything unreasonable. All we want is to revitalize our nations and our communities, to bring life back to our people. By helping us, you will have enabled us to do this wonderful thing for our relatives and for the countless generations yet unborn. We look forward to your response to this important testimony and to the requests we have made therein.

Sincerely,



Darrell Drapeau, Chairman
Dakota Tribal Chairman's Council and
Chairman, Yankton Sioux Tribe



Greg Bourland, Secretary
Dakota Tribal Chairman's Council and
Chairman, Cheyenne River Sioux Tribe



THE
NAVAJO
NATION

ALBERT A. HALE
PRESIDENT

December 18, 1995

THOMAS E. ATCITY
VICE PRESIDENT

WRITTEN TESTIMONY OF NAVAJO NATION REGARDING THE IMPLEMENTATION OF
THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT
SUBMITTED TO THE SENATE COMMITTEE ON INDIAN AFFAIRS BY ALAN DOWNER,
DIRECTOR, NAVAJO NATION HISTORIC PRESERVATION DEPARTMENT

The Navajo Nation would like to begin by expressing its appreciation to the Committee for the opportunity to comment on the implementation of the Native American Graves Protection and Repatriation Act (Act). The Navajo Nation was a strong and active supporter of the Act throughout its labored development and enactment. As the Navajo Nation's lead agency for matters that are subject to the Act, the Historic Preservation Department has been active both in the development of the Act and in its implementation from the outset.

The Navajo Nation has had generally favorable experiences with the implementation of the Act. It is the Historic Preservation Department's impression that the museums and federal agencies with which it has dealt have been pursuing the mandates of the Act in good faith, attempting as best they can to comply with both the letter and the spirit of the law. The Historic Preservation Department has had dealings, in one form of another, with over 280 museums so far. We have yet to find a single instance where we felt that the museum was stalling or attempting to some how or other avoid compliance with the Act.

While the Navajo Nation's overall experience has been generally positive, we do believe that there are several issues of which the Committee should be aware.

1. It is clear that the deadlines contained in the Act are totally unrealistic, especially in light of the Administration's and Congress' apparent reluctance to provide ample funding for the grants program created by the Act. Neither the Tribes nor (we suspect) the Museums have the requisite fiscal resources to deal properly with repatriation.

The preparation of inventories is time consuming and costly. Review of the inventories is equally time consuming, especially when the Historic Preservation Department must deal with over half of the museums which have filled inventories. The inventories are based largely on existing accession records, which may or may not accurately reflect what the collectors and/or curators thought they

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had collected. It is clear from the Historic Preservation Department's experience that the collectors/curators may or may not have really known what they had. Accordingly, the Historic Preservation Department has made it a practice to examine collections in person rather than to rely on the inventory description as a basis for beginning repatriation activities. The inventories simply alert the Historic Preservation Department to the fact that a museum has Navajo material in its collections. The Historic Preservation Department must then begin to make a determination of whether or not the collection contains any Navajo materials that should be repatriated.

This entails sending staff to museums, sometimes for extended periods to examine collections and determine, what if any material constitutes Navajo sacred or ceremonial items and cultural patrimony. This can be very costly. But we have no other option if the Navajo Nation is to obtain return of those items which really should be returned to the Nation and put back in use in traditional ceremonies or otherwise appropriately treated.

The Navajo Nation believes that a minimum of \$10 million must be appropriated to fund grants to Tribes. Anything less than that amount is simply totally inadequate to meet the minimum Tribal needs to expeditiously complete the processes established by the Act and its implementing regulations.

2. It appears to the Navajo Nation that the definition of Indian Tribe in the Act may be too restrictive. The Navajo Nation supported the Act both because it sought to have Navajo items of cultural patrimony returned to the Navajo Nation. But the Navajo Nation did not view this issue in the narrow light of Navajo interests alone. Instead, the Navajo Nation recognized that this is a matter deeply affecting all Native Americans and the Navajo Nation's involvement with these issues has always conducted recognizing this larger context.

The purpose of the Act is to ensure that Tribes can obtain the return of human remains and items of cultural patrimony which are inappropriately in the possession of museums and federal agencies. The Navajo Nation has always understood that the principal purpose of the Act was to promote rapid repatriation of such materials to the proper Tribe. It appears that there may be Tribes which are excluded from this process because they do not have federal recognition. While we believe it may be premature to seek amendments to the law at this time, we do think that the Committee

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should continue to monitor this issue and consider seeking to amend the Act, if it becomes clear that this issue is a serious problem.

3. Our experience indicates that there are a number of portions of the Act, which were drafted very carefully to resolve a very specific problem which have been found to have unintended or otherwise negative consequences. For example, Congress has created a property right in human remains and vested that right in Tribes and/or individual Native Americans according to a carefully specified priority listing. Creating a property right and vesting it Native Americans was probably essential to eliminating the museums' erroneous claims of ownership rights to those remains they possessed.

Unfortunately, creation of this right has lead to increased tensions between some Tribes, which result from conflicting claims of ownership. Exacerbating such tensions is the fact that archaeological evidence (of which human osteological data can sometimes be a part) can figure heavily in litigation pertaining to land and resources claims of Tribes. In some instances several Tribes have conflicting claims to land and resources, and a federal agency's determination of who is the rightful owner of human remains has the potential to provide evidence to one side or the other in such a dispute.

At this point the Navajo Nation does not believe that an amendment to the law is called for. However, we do believe that this is an issue that should be tracked closely. It may well be the case that in the future problems arising from these unintended consequences, may need to be resolved by amending the Act.

4. A federal District Court in Hawaii has ruled that human remains do not have standing under the Act. In reading the Court's opinion, it is apparent that in some striking ways Navajo beliefs are very similar to the Native Hawaiian belief that the spirits of the dead continue to live, albeit on another plan of existence. There is communication between the spirit world and the everyday world of the living. Spirit beings can affect the living and the living can affect the dead. In Navajo tradition, disturbance of the dead (of any ancestry) can lead to very serious adverse consequences for individuals, families, communities or even the entire Nation. The Navajo Nation, however, agrees with the Court that the practical difficulties arising from who would "speak" for the remains would make it all but impossible to apply such standing

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as a practical matter in a federal Court. As a practical matter, the Navajo Nation believes that the disturbance of the spirits of the dead can only be dealt with in the appropriate traditional settings of the people descended from the remains. Furthermore, the Navajo Nation believes that allowing such standing could well lead to the sorts of unintended consequences just discussed.

The Congress should not consider amending the Act in this area unless further experience indicates that this is the only way to redress abuses of the intent of the Act.

5. The Navajo Nation notes with some interest the suggestion made that the Act be amended to provide for some form of "guardianship." Such a concept has some appeal because it would provide for a definitive resolution of a number of problems. However, the Navajo Nation's reading of the Act suggests that in essence (if not in express language) such a concept is inherent in the Act today.

The Act establishes a clear delineation of ownership of remains according to an explicit priority listing of ownership. Clearly, the owners should be regarded as the "guardians." Where a Tribe declines to assume its rightful role in this regard, the Navajo Nation does not see that any good can come from arbitrarily assigning such a role to another party or from trying to impose guardianship on a reluctant Tribe.

The Navajo Nation is well aware that some Tribes believe that the damage caused by disinterment in the first place can not be remedied. In addition, a number of Tribes believe that the consequences of attempting to undo the damage already done by exhumation and "curation" is too dire to even contemplate.

Accordingly, while the Navajo Nation is sympathetic to the concept, it can not support arbitrary assignment some form of guardianship to a Tribe or tribal organization beyond the concepts already embodied in the Act.

6. The Act recognizes that there may be instances when more than one Tribe makes a claim for repatriation of human remains and/or items of cultural patrimony. On the surface, the Act provides for dispute resolution by the agency, the agency must examine the evidence and make a decision. However, the Navajo Nation finds the Act ambiguous on this point. On the one hand, agencies are directed to make a decision based on the preponderance of the

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evidence. On the other hand, agencies are prohibited from repatriating items while a dispute exists. Finally, federal Courts appear to have decision making authority, but it appears to the Navajo Nation that, since the Act provides no real basis for an agency to make a decision, there is no real way for a claimant to exhaust the administrative process and then appeal to the Courts for resolution.

The Navajo Nation recommends that the Committee examine the language pertaining to agency decision making when disputes arise and consider amending the Act to provide agencies with clearly delineated authority to reach an administrative decision.

7. Questions regarding the confidentiality of data in the museum inventories and with respect to any research conducted during their preparation have arisen as a result of the federal district Court's ruling in *Na Iwi O Na Kupuna O Mokapu, et al. vs John Dalton, et al.*

The Navajo Nation believes that the Court has correctly read the Act and the Freedom of Information Act (together with relevant case law). Furthermore, the Court has given balanced consideration of the issues surrounding the public benefits of disclosure and the need to protect general information in the inventory and any associated research from disclosure. As a general matter, the Navajo Nation sees no need to amend the Act in this regard.

However, the Navajo Nation does believe that there is a compelling need to protect locational information from disclosure. Native American grave sites (both original locations and reinterment locations) are vulnerable to looters. It is this status as looters' targets that led Congress to prohibit unpermitted excavation and trafficking in Native American human remains. Accordingly, the Navajo Nation believes that an amendment to the Act be enacted which expressly exempts locational information from public disclosure under the Freedom of Information Act.

In closing, the Navajo Nation would like to reemphasize that it appreciates the efforts of Congress, and more particularly this Committee, to ensure the prompt repatriation of Native American human remains and items of cultural patrimony. This is an important and highly sensitive area, the complexities and nuances of which the Act deals with, for the most part, with great success. The Navajo Nation urges the Committee to continue to oversee implementation and to consider carefully limited amendments if and

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when serious implementation problems arise. The Navajo Nation urges the Committee to carefully consider potential unintended consequences of the Act and any amendments. The Navajo Nation believes that implementation of the Act so far has revealed several such unintended consequences, which may prove serious in the long run.

The Navajo Nation thanks the Committee for this opportunity to provide testimony. If the Committee has any questions, wishes to discuss any of this testimony, or if the Committee feels that the Navajo Nation can provide any further assistance in furthering the aim of the Act, please feel to contact Dr. Downer directly.

Statement by David C. Holt (Ti' Ped Ki'uun) Nez Perce
on implementing of the Native American Graves Protection and Repatriation
Act, (P.L. 101-601)

In the beginning, Grandfather Creator and Mother Earth blessed we Nez Perce or Nee Mee Poo. All other Indigenous people were also blessed. The Creator and Mother Earth provided for all of our relations. I am one of your relations, we all are related, everything is connected according to Earth Law.

Grandfather Creator placed us in our homelands. We the Red Nations along with the buffalo, the fish, the birds, the medicines, and all our other relations on this continent are the Indigenous people. We have always been here on this continent. The people who have immigrated from other parts of our Mother Earth now make the laws with their Senate and Congressional Representatives. They now are the majority, still knowing little about Red Nations and so, still violating their human rights. Laws made for mainstream society, have made indigenous people suffer worldwide.

Since the first foot-steps of non-Indians on our country Indian Nations have suffered as people. We are still denied our Religious Freedom from the very immigrants who came to our lands seeking Religious Freedom. They still come... Grandfather Creator knows they have amnesia when it comes to so-called "Law of the Land," or treaties made with Indian Nations. The treaties and lives of Indigenous people have been broken. We now are victims to the immigrant's, policies, laws and regulations. We are victims to their Religious dictates, their attitudes, ignorance and arrogance.

The immigrants hold dearly to their archaeological evidence and theory of the Aleutian Islands as a land bridge from which the Indians supposedly came. If this were so, immigrants who now occupy our lands, oppress our people with their laws, would be rid their guilt for inhumanities inflicted during genocide against Indian Nations and exploitation of all our relations.

Our ancestors remains, their tools, and beliefs are studied and used against we descendants. Desecration continues in the use of archaeological evidence studied while immigrants try to rid their guilt. Obviously the evidence is our ancestor's remains, sadly many are human remains.

Meanwhile our lands are flooded with more immigrants who study our ancestors, their remains and pay to see them in Federal, state and private museums and parks, or private and public collections.

Now we must comment on new rules and regulations which deal with remains of our ancestors. This within government policy dealing with lineal criteria established by descendants of the immigrants. There have been Non-Indian and Native champions though. They have helped to provide the Native American Graves and Protection and Repatriation Act or NAGPRA.

A lack of good faith and a continuation of human right violations existed in preparation and implementation of the rules and regulations of Monday

December 4, 1995 published in the Federal Register . Even though there was a review committee made up with Native people, without proper funding good faith flies out the window.

The review committee, in monitoring implementation, consulting with the Secretary, advising Congress, and facilitating the resolution of disputes lacked the appropriate funding to provide for adequate results. Disputes should be settled on behalf of the original people in good faith.

The number of disputes is expected to increase, making it more difficult to resolve conflicts between museums, Indian tribes, and Native Hawaiian organizations. Presently, for instance, the Nez Perce tribe located in the northwest, has to buy back the remains of their ancestors from a private collection. Their dispute, caused from the infliction of missionaries upon them from the government. Now after being stripped by missionaries of their belongings, who then sold them for under \$50.00 Now our people must pay almost \$600,000.00 for their return.

Almost ten years ago, as an elected official for the Nez Perce, I supported the contracting of the Nez Perce Historical Park by the Nez Perce tribe. Tribes already 93-638 contract most Bureau of Indian Affairs programs. The Nez Perce would manage and run the museum and park centers. The park centers around Nez Perce history primarily anyway. There is some justification for the Spalding missionaries life to be cited there, however much of the inhumanities they inflicted upon the Indians is hidden by present depiction's and interpretations by the National Park Service.

The grant program initiated in FY 1994 is needed now more than ever to facilitate reviewing documentation, establishing cultural affiliation, promoting ongoing dialogue between Indian tribes, Native Hawaiian organizations, Federal agencies and museums.

The Nez Perce have hundreds of human remains scattered across the nation. The government enforcing their "steal-treaties" on the Nez Perce and enforcing their religious teachings upon our people have left many of our people's bodies scattered like dust in the winds. The documentation is vast in volume and so scattered in different states, private and federal depositories.

Sadly the appropriations are meager. Fear and ignorant compliance of a vaguely presented, "Contract with America" has lowered the Senate and Congressional representatives sensitivity to treaty compliance, human rights and equal protection of the laws. We suffer by appropriation and we are being attacked by appropriation process.

Appropriations for NAGPRA implementation within the budgets of Federal agencies, particularly the land management agencies with the largest collections and lands to mange; i.e., NPTS, BLM, FWS, BOR, and Army Corps of Engineers, are essential if agencies are to meet their statutory requirements.

As recommended by the review committee for such a large and complex program appropriations need to be increased to about \$10 million. With the hundreds of Indian and Native Americans and organizations the increase should be atleast \$50 million. This would be good faith appropriations.

Impending disputes will arise over the meaning of "Indian Tribe" further burdening inadequate appropriations. Congress should clarify the meaning of "Indian Tribe" within NAGPRA in order to permit Native American groups not presently recognized by the Department of Interior Bureau of Indian Affairs to repatriate their human remains, funerary objects, sacred objects, or objects of cultural patrimony.

Congress must take steps to assure that the Smithsonian complies with all NAGPRA requirements. The Smithsonian up until November of 1995 had posted in the Natural History building in the Native Cultures display area, a very derogatory article about the Native Protection Graves Protection and Repatriation Act. The article was posted for months on the bulletin board for all passing public to read. This article was very biased and racist,

The article written from an archaeologist's point of view, blames Indians for destroying history. This destruction comes from enactment and enforcement of NAGPRA. A picture was taken of the posted article and story written by America's Eagle Magazine and published last year. America's Eagle Magazine has mailed the U.S. Senate Indian Affairs a copy of the story.

The Smithsonian operates under a variety of policies regarding Native American repatriation. The Smithsonian does not have to provide inventories of human remains and associated funerary objects to Native Americans on or before November 16, 1995.

The Smithsonian does not have to provide written summaries of its holdings to tribes. The Smithsonian does not have to follow the repatriation procedures for human remains or cultural items required of all other museums federal agencies, or universities.

Congress must consider legislation to protect Native American and Native Hawaiian graves located on state or private lands from grave robbing and other kinds of destruction and desecration. Enforcement suffers from ignorance from assumed jurisdictions and political in-fighting by states and tribal and native governments and organizations causing some delay in repatriations.

Publication of Federal Register notices on time may be difficult given available resources. This could delay repatriations. Any publication of civil penalty regulations, need to ensure compliance with the statute, will require additional effort to meet new enforcement responsibilities.

There has been confusion by some tribes as to the roles of the Interior, the tribes, and museums and parks. The December 4, 1995 regulations are less more constraining on the Indian people than the museums. Still a lack of address to

private collections, private lands and enforcement echoes a meager impact in the long run. Tribes face excessive tribal delays, costs in attorney fees, travel, and other impending problems.

I provide two stories in which the Congressional and Senate representatives can relate to. (Note Attached) To the Non-Indian world, to the U.S. Government, our Chiefs are our spiritual leaders, our peace-keepers and our Presidents. Look at these two articles and realize the date...early January 1996. How would the Congress and Senate like to read of the skulls of their presidents being removed from their bodies?

We all have supported the repatriation of our dead from Vietnam. The same support is needed both in money spent and the effort into repatriation. It is only right that human beings be respected even after death.

That is all,
David C. Holt
David C. Holt,
Ti' Ped Ki'uun

10/30/88 SPOKESMAN

Geronimo's skull lifted?

Skull and Bones role of the Bushes comes up for questioning

By Paul Brinkley-Rogers
Arizona Republic

OLD WEST

He died an old man, a prisoner of war who dressed up in ridiculous costumes to pose for tourist photos. But in life, he was as free and elusive as the wind.

He was such a scourge in the Southwest that the U.S. government buried Geronimo where they held him, in Fort Sill, Okla., far away from Arizona, where he and his Chiricahua Apaches had held out until the end.

In 1900, his remains were laid to rest, interred in a concrete and iron tomb at Fort Sill that to this day remains a tourist attraction.

Or were they?

A former chairman of the San Carlos Apaches believes, based on some historical documents and an unusual encounter with the brother of Vice President George Bush, that soon after Geronimo was buried, a group of young Army officers broke into his tomb as part of a prank.

Ned Anderson, who led the tribe from 1978 to 1986, wants Rep. Morris Udall, D-Ariz., to open a congressional investigation into the matter. Anderson says documents from Yale University's secretive Skull and Bones society, a student and alumni club, show that George Bush's father, Prescott S. Bush, led the grave robbers and took Geronimo's skull so he could hang it on the clubhouse wall.

In September 1986, Anderson said, Jonathan Bush, the vice president's brother, tried to return the skull and other relics to Anderson in New York City after the Apache leader pointed out that tribal members regard the remains as sacred. He showed documents from Skull and Bones, into which all three Bushes were initiated, that spell out in detail what Prescott Bush and his friends did that night 70 years ago.

Anderson said Sen. John McCain, R-Ariz., tried to help by attempting to set up a meeting with the vice president two years ago when Bush was in Phoenix, but a meeting failed to come off.

"I concluded at the time that he, Bush, probably did not want to meet with me because he knew I was going to raise the Geronimo issue," Anderson told Udall in a February letter requesting a congressional probe into "this bizarre, atrocious desecration."

Earlier this month, a group of history buffs in El Paso insisted that Skull and Bones members paid an American adventurer



Are Geronimo's remains in a grave at Fort Sill?

revolutionary leader Pancho Villa from his grave in Chihuahua.

Endicott P. Davison, a lawyer for the society, denied that allegation in an interview with The Arizona Republic.

The El Paso group nevertheless wrote to George Bush asking the vice president to help return the skull to Mexico. A spokesman for

Davison did not return phone calls asking him to comment on Anderson's allegations.

Jonathan Bush also did not return calls to his home and to his New York business office, where Anderson said the failed negotiations for the return of the skull occurred.

Skull and Bones is one of several

SKULL / FROM G1

elite secret societies at Yale dating from the 19th century. Its members include a long list of prominent government and business leaders, and the club steadfastly refuses to discuss its rituals or to even make membership lists public.

Relating the story of how the vice president's father engaged in a "mad expedition" at Fort Sill, a 1933 *Skull and Bones History of Our Order* says, "An ax pried open the iron door of the (Geronimo's) tomb, and ... Bush entered and started to dig.

"The skull was fairly clean, having only some flesh inside and a little hair," the author of the account wrote as he described how the raiders cleaned it with carbolic acid. "I showered and hit the hay ... a happy man."

The elder Bush robbed the grave, the document said, "To bring to the T. (an apparent reference to the 'Tomb' or clubhouse) its most spectacular 'troop,' the skull of Geronimo the terrible, the Indian chief who had taken 49 white scalps."

Anderson said that after obtaining the account and a photo of the skull as it is displayed at society headquarters from a *Skull and Bones* member he would not identify, he went to New York City to meet with Jonathan Bush and Davison, in an attempt to retrieve the remains.

"After a series of meetings, Anderson said that on Sept. 26, 1986, Jonathan Bush and Davison attempted to hand over a skull. Anderson said he refused to accept it because he did not believe it was the one on display in the *Skull and Bones* clubhouse.

Anderson said Davison drew up a document for him to sign, saying the Apache leader agreed it would be "inappropriate for you, me or anyone in association with us to make or permit any publication in connection with this transaction." Anderson called the document "very insulting to Indians."

Anderson also said he was confused and annoyed because the document also said that *Skull and Bones* members had submitted the skull to "an expert in New Haven (where Yale is located in Connecticut)," who determined that the remains were that of a child and

therefore "cannot possibly be those of Geronimo."

Anderson said he refused to sign the document but retained a copy of it and the copy of the club history, which Davison tried to retrieve from him, to press his quest for the skull elsewhere.

He said that the cavities for the eyes and the nose in the skull the two men offered him "did not match those in the photo of the skull I had."

A bridle and other leather items enclosed in the wood-and-glass showcase for the skull "apparently were genuine," he said, "but I believe someone switched the skull."

Anderson met with Udall in February 1987 in Phoenix to protest the situation and then wrote to him this year to ask for an Interior Committee hearing. He cited Geronimo's often expressed desire to be buried in Arizona instead of in Oklahoma.

"Given the fact that George Bush was a member of *Skull and Bones* in 1948," Anderson wrote Udall, "and therefore had to have seen these remains on display during that time and ... curiously he did not say or do anything about them."

"It would seem to me that even a person possessing a mediocre level of intelligence quotient would have questioned the origin of a display that depicted that the contents were the remains of Geronimo."

Frank Ducheneaux, counsel on Indian affairs for the House Interior Committee, of which Udall is chairman, said Udall "took it under consideration, but just didn't see how the committee could get into that."

The Apache tribe itself did not make a formal request for action, and that would have been a factor in Mo's acting upon it.

In 1984, Apache leaders from reservations in Arizona, New Mexico and Oklahoma failed to agree on a request by Anderson and Ronnie Lupe, former chairman of the White Mountain Apaches, that Geronimo's remains be returned to Arizona for reburial in accordance with tribal custom.

Opposition to the idea, and to the notion of exhuming his body, was led by Geronimo's descendants, who number about 125 and still live in the Fort Sill area.

Nez Perce Graves Are Desecrated

CLARKSTON, Wash., Sept. 3—(UPI)—Nez Perce Indian graves, including that of Chief Joseph, have been robbed and desecrated near here, anthropologists said today.

The 38 graves, dating back more than 100 years, were in an old burial ground about 15 miles west of here.

Dr. Roderick Sprague, University of Idaho anthropologist, said he, graduate assistant Mike Rutherford and a group of eight workers went to the site to move the graves. The burial ground is to be covered by the pool to be formed when Lower Granite Dam on the Snake River is finished in 1975.

Dr. Sprague said rods had been driven into the ground

to locate coffins, which were opened and robbed of jewelry and skulls.

Human skulls are worth \$25 each on a bizarre "underground" market and considerably more when smuggled to California, authorities said.

"It makes me mad to just be around the place and see what has been done," said Richard Halfmoon of Lapwai, Idaho, chairman of the Nez Perce Tribal Council. "We know the name of the dentist who has Chief Joseph's skull and uses it for an ashtray."

Chief Joseph, the Nez Perce's greatest chief, led a faction of the tribe on a brilliant, 1,500 mile flight toward Canada, pursued by U.S. cavalry. The retreat is still studied by military tacticians.

*Successes, Problems, and Challenges:
Implementing the Native American Graves Protection and Repatriation Act*

Testimony to the Senate Committee on Indian Affairs
Presented by Dan L. Monroe

Immediate past President, American Association of Museums
Executive Director & CEO, Peabody Essex Museum
Member: NAGPRA Federal Review Committee
December 3, 1995

Overview

On whole, affected parties, which include several thousand museums, universities, federal agencies, and Native American tribes, have implemented the Act in accordance with the intent and spirit of the law. More than 2,700 Native American human remains and 122,948 associated funerary objects have been repatriated. Sixteen objects of cultural patrimony, and 212 sacred objects have also been repatriated.

Key results of the Act to date include:

- Establishment of equal treatment under the law for Native American dead
- Partial restoration of individual and tribal cultural and religious integrity
- Assistance in helping several tribes continue or restore traditional Native American religious practices
- Increased partnership among many museums, universities, and federal agencies resulting from dialogue required by the Act—benefits include greater knowledge of collections, better public interpretation of Native American art and culture, and increased understanding and appreciation of the Native American experience

Given the large number of agencies and individuals involved in the Act, and the complexity of issues the Act addresses, there have been remarkably few disputes among the affected agencies and parties. The museum and scientific communities have generally embraced the principles of the Act and carried out its provisions in good faith, often at considerable individual and institutional expense. Tribes have done the same.

While implementation has not been without significant challenges and difficulties, and while it is too soon to give any comprehensive, long-term assessment of the impact of NAGPRA, to date the Act has largely succeeded in realizing Congressional objectives.

Problems and Issues

Need to complete promulgation of regulations: The Act called for establishment of regulations within a year of its passage. Five years later, regulations have yet to be promulgated though regulations covering part of the Act will soon be published. There are several reasons for this extended delay.

- The Review Committee was not appointed until a year after passage of the Act and it can only meet, due to budget restrictions, two to three times a year
- Regulatory issues are sensitive and they require substantial input from affected parties and subsequent consideration by the Review Committee and the Secretary
- The Department of Interior's NAGPRA Office is small and its workload is large
- The Department of Interior is a large federal bureaucracy: it is difficult to move regulations through the system in a timely manner

Absence of regulations over the last five years has caused unnecessary confusion and expense to museums, universities, federal agencies, and Native American tribes. Though key deadlines for the Act—filing of summaries and inventories—have passed, it is important that regulations for the remainder of the Act be promulgated within a reasonable time.

Need to increase financial assistance to museums, universities, and Native American tribes: Congress has appropriated \$4.37 million for grants to museums and tribes. This amount is less than 5% of the total, conservatively estimated \$55 million in costs for NAGPRA implementation to date. Neither museums, tribes, nor Native Hawaiian organizations operate with significant discretionary funds. The financial burden to all parties will continue to be heavy as consultation related to inventories of human remains and associated funerary objects increases. Congress is making substantial cuts to federal support for museums and tribes. These cuts will hurt the ability of some museums and of many tribes to carry out NAGPRA implementation in an effective, timely manner.

Our nation has spent vast amounts of money, rightly, in an effort to repatriate 2,500 of our dead from Vietnam. There are tens of thousands of Native American dead that should be repatriated. The nation has a moral responsibility for return of these remains, many of which were taken under federal auspices. Federal financial support for NAGPRA should, at a minimum, be doubled for the next three years.

Limited ability of non-federally recognized tribes to participate in the Act. The Department of Interior has interpreted the definition of 'tribe' in the Act to apply only to federally recognized tribes. Thus, many tribes, some previously recognized by the federal government and others not, have been disenfranchised or partially disenfranchised from the benefits of the Act. More than fifty tribes are presently filing for federal recognition. The Review Committee has urged the Secretary to adopt a more liberal meaning of the term 'tribe' for the purposes of the Act and applicable only to the Act, but to no avail.

While some museums, tribes, and the Review Committee have cooperated to return some human remains to non-federally recognized tribes, the general exclusion of non-federally recognized tribes who possess continuing cultural identity represents an important flaw in the construction of the Act, or its interpretation. *Short of amendments to the Act, which are not generally favored at present. Congress can recognize this problem and urge the Secretary to seek means to ameliorate it.*

Exclusion of the Smithsonian Institution from NAGPRA: The Smithsonian Institution, the national museum, is not presently required to adhere to the terms and provisions of NAGPRA, although assurances were given at the time NAGPRA was passed that the Smithsonian would adhere to its provisions. Instead, the Smithsonian operates under separate legislation. The various Smithsonian museums operate under a variety of policies regarding Native American repatriation. The Museum of the American Indian's policies provide greater opportunity for repatriation of Native American human remains and cultural items than NAGPRA terms and provisions. The American Museum of Natural History operates under separate policies. While the Smithsonian has spent substantial money, time, and energy on repatriation, its policies do not uniformly assure the same rights to Native Americans as those guaranteed under NAGPRA.

Specifically, the Smithsonian does not have to:

- provide inventories of human remains and associated funerary objects to Native Americans on or before November 16, 1995
- provide written summaries of its holdings to tribes
- follow the repatriation procedures for human remains or cultural items required of all other museums, federal agencies, or universities

The Smithsonian Institution argues that it is making solid progress in repatriating human remains and cultural items and that bringing it under NAGPRA's provisions would only encumber and slow their work. We believe that as the national museum the Smithsonian should set an example for other institutions and that present Smithsonian policies, which vary from museum to museum, do not accord the same level of rights and protections to Native American tribes afforded under NAGPRA.

To bring the Smithsonian under NAGPRA now could only be done through a general policy decision of the Secretary of the Smithsonian or by passing new legislation. A general policy decision for all Smithsonian museums to adhere to NAGPRA is a simpler option than new legislation. In any case, special provisions would have to be made for the Smithsonian since they have not uniformly filed summaries or inventories, or otherwise complied with the Act. The Review Committee, notwithstanding its difference of opinion with the Smithsonian on this matter, plans to work closely with the Institution to address matters of mutual concern.

Unidentified and Unclaimed Human Remains and Associated Funerary Objects:
The most difficult unresolved NAGPRA issue involves the disposition of unidentified human remains and associated funerary objects. The Review Committee is required to make a recommendation to the Secretary on this important matter. The fundamental problem is that NAGPRA provides for return of human remains and cultural items where cultural affiliation with a specific tribe is established. There are many Native American human remains that cannot be identified or affiliated with a specific tribe.

The Review Committee has taken testimony on this controversial issue from the Native Americans, scientists, museum professionals, and federal agencies. The controversy is hottest with respect to disposition of ancient Native American remains. These remains can seldom be affiliated with a specific tribe. Scientists and others argue that much can be learned from these remains and therefore they should be retained for further study. Native Americans almost unanimously argue that they are culturally and otherwise affiliated with these remains and that their religious and cultural beliefs dictate that the remains be returned and reburied.

The Committee issued a set of draft recommendations on this matter for comment. The draft recommendations stated, in effect, that Native Americans are most closely affiliated with unidentified remains and that they should, therefore, have the ultimate right of disposition. The response was substantial and contentious. Several scientists and others responded by accusing the Committee of racial bias. Native Americans generally applauded the draft recommendations. The Committee is taking the draft recommendations under advisement and will likely make changes to the draft, based on several thoughtful commentaries.

At its heart, this issue involves rights of scientific inquiry versus Native American religious rights. There is some question as to whether or not the Secretary has the authority, under the wording of the Act, to promulgate regulations on disposition of unidentified and unclaimed human remains. In any case, it is likely that Congress will hear more about this issue in the future.

Conclusion. The Department of Interior's Repatriation Office, under the leadership of Dr. Frank McManamon, has done, on whole, an excellent job overseeing implementation of the Act, especially given the limited staff and resources assigned this office. Thousands of museum, university, and federal agency officials have carried out the provisions of the Act in good faith and good spirit, as have Native American tribes and their representatives. The Act has promoted an increased respect and appreciation for differing world views and cultural values. Taken on whole, the Act has helped remedy past injustices, it has enhanced the cultural and religious integrity of many Native Americans, and its has produced a new, and better, relationship among Native American tribes, museums, federal agencies, and universities. It has, therefore, largely succeeded in achieving the purposes for which it was crafted. However, failure to provide greater federal financial assistance for tribal review of inventories and face-to-face dialogue and consultation may seriously jeopardize successful implementation of the Act.

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January 26, 1996

The Honorable John McCain, Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Senator McCain:

I deeply appreciate and commend you for the tremendous leadership and support you have provided to Native American affairs and to the issue of repatriation. Following are answers to the questions you asked regarding my testimony and that of others at the hearings on implementation of the Native American Graves Protection and Repatriation Act.

1. How does the NAGPRA Review Committee plan to work closely with the Smithsonian Institution regarding repatriation issue of mutual concern?

The Committee has testified that it believes the Smithsonian Institution, as the national museum, should adhere to NAGPRA statutory provisions. NAGPRA provisions provide deadlines for notification to tribes regarding holdings of human remains and cultural items. Several Smithsonian museums have not met these deadlines since they operate, at present, outside of NAGPRA's authority. Thus, many tribes do not know what human remains or cultural items of potential interest to them may be housed at the Smithsonian.

Smithsonian museums are not required to go through NAGPRA dialogue processes with individuals or tribes to resolve repatriation issues. Finally, Native Americans who may have concerns regarding repatriation issues at the Smithsonian do not have access to an independent review committee to address their concerns. The Committee has made clear to the Secretary of the Smithsonian that we believe the Smithsonian should comply with NAGPRA provisions. The Secretary has responded that he does not intend to assure that all Smithsonian museums comply with NAGPRA, notwithstanding earlier pledges by the Secretary preceding him to do so. Under this circumstance, the Committee has made clear that, notwithstanding a disagreement regarding compliance with NAGPRA, it stands ready to work in whatever ways possible to assist the Smithsonian in carrying out repatriation of human remains and appropriate cultural items. No specific plan of cooperation or coordinated action has, however, been developed.

2. The terms of the Review Committee members are set to expire in 1997. Do you believe that these terms should be extended and if so, for what length of time?

The work of the Review Committee is not complete. Regulations have not been promulgated (much to the Committee's chagrin and regret) to cover the entirety of the Act. The present members have, however, gathered and listened to a tremendous amount of testimony from all affected parties and from all parts of the nation regarding regulatory issues.

It would be nearly impossible for new Committee members to gain access to much of this testimony since it is not written but was rather delivered verbally. If the Department of Interior dedicates sufficient resources to the Act, it would be possible to complete regulations by late 1998. Additionally, the Committee is likely to receive considerable 'business' subsequent to the filing of inventories with tribes. Thus I recommend that the present Committee continue in place until 1999 and that a new Committee be appointed to continue the work, such appointments to be solicited, considered, and made by the Secretary of the Interior, after that time.

3. When will the Review Committee make a final recommendation regarding disposition of unidentified human remains? Do you believe it is necessary for the Secretary to promulgate regulations to enforce the Review Committee's recommendation on the disposition of unidentified and unclaimed human remains?

The Review Committee is working as quickly as possible within the limits of time imposed by a schedule of three meetings a year to complete its recommendations on this difficult set of issues. The matter is contentious. The Committee has heard many in the scientific community argue that unidentified remains, especially ancient remains, should be retained by museums, universities, and federal agencies due to their research value. Most Native Americans want these remains reburied. NAGPRA provides little guidance on this matter since, by definition, it is not possible to establish cultural affiliation for these remains. I expect the Committee to submit a second set of recommendations for field comment in 1996 and to attempt to make a recommendation to the Secretary of the Interior in 1997. The Secretary will then have to prepare draft regulations and allow time for field comment prior to promulgating regulations. There is no question whatsoever but that the Secretary will have to promulgate regulations. The Review Committee's recommendation does not carry the force of law and, given the contentiousness of the issue, it is highly likely that some agencies would choose, absent regulations, not to adhere to the Review Committee's recommendations.

4. Na Iwi O Na Kupuna O Mokapu, Heleloa, Ulupa u A Me Kuwa'a'oh v. John Dalton

Should the Freedom of Information Act be applied to NAGPRA inventories?

This is a difficult issue since it requires balancing freedom of information against potential damage to Native American graves caused by release of information regarding Native

American grave sites, many of which are located at remote locations that are difficult to protect. In general, I believe that there should be some constraints on unfettered public access to inventories. There are several possible approaches. Anyone requesting access to inventory information could be asked to state their purpose in acquiring this information; their name and address could be obtained; and tribes could be notified that the information has been requested. If tribes object to dissemination of the information then references to geographic location of burial sites could be eliminated from the inventories prior to their release. This approach provides some protection without unduly limiting research or other legitimate access to inventory information. While time-consuming, this approach is less troublesome than exempting NAGPRA inventory information from the Freedom of Information Act entirely, thereby inhibiting historical or other studies, including those that Native American historians may wish, at some time, to undertake pertaining to the acquisition of Native American human remains. Congress will need act on this matter, given the above court ruling, if some protection is to be provided to Native American grave sites.

Does NAGPRA adequately address the issue of scientific studies of human remains?

I believe NAGPRA statutes are clear with respect to extended scientific studies once cultural affiliation has been established. Statutes explicitly prohibit additional study following a determination of cultural affiliation based on existing records. I am at a loss to understand the court's ruling on this matter.

Are new definitions of 'inventory', 'scientific study', and 'scientific information' required in NAGPRA given the court's ruling in Hawaii?

It will obviously be necessary, either by statute or by regulation, to clarify the meaning of 'scientific studies' and 'scientific information' to protect against unwarranted additional study following a determination of cultural affiliation. The intent of NAGPRA was clear--no additional studies are to be undertaken once cultural affiliation has been established. To permit additional studies often represents a violation of Native American human rights and religious convictions, as well as providing for delays in repatriation.

Under what circumstances, if any, would further scientific studies, either during the course of compilation of an inventory or after the conclusion of such an inventory, be warranted?

Scientific studies approved by tribes likely affiliated with remains may be justified during compilation of an inventory. Scientific studies that are opposed by tribes likely to be affiliated with human remains should not be undertaken. Scientific studies undertaken after inventories have been completed should only be permitted when the national interest is at stake, or when further study may help resolve determination of cultural affiliation. Scientific studies of ancient remains that are not affiliated with any present day tribe or set of tribes constitutes a distinctly different set of issues. The Review Committee has not formulated a position on this question.

Should Congress amend the Act to provide authority for legal actions to be brought by those who may qualify to serve as guardians for the purposes of invoking the Act to protect Native American human remains?

Since a good portion of the law has become so technical that even knowledgeable, well educated persons cannot understand it within a reasonable period of time, it is difficult to comment in an informed manner on this question. In general, the Hawaii case denies that human remains, taken alone, have standing before the law, though courts have permitted suits to be filed on behalf of animals and ecosystems. Human remains are, by definition, dead in Western belief systems. The law is based on Western belief systems. Traditional Native Hawaiaan beliefs contradict this position since traditional Native Hawaiaan beliefs take human remains to be, in a very real sense, alive. Since the dominant society makes the rules it is unlikely, as borne out by the Hawaii ruling, that any court will be willing to accord human remains standing. The court did, as I understand the ruling, give Hui Malama standing in the case but it denied that the remains themselves could have standing. In short, it is unclear to me whether or not the court's decision requires additional Congressional action regarding guardianship. I am not clear that the court's ruling denied guardianship capacity on the part of Hui Malama. If I have failed to understand the ruling and the court denied Hui Malama guardianship capacity for these remains then I would support Congressional action that assures that Hui Malama and tribes have the ability to act as guardians over human remains with which they are affiliated.

I appreciate the opportunity to address these issues and I look forward to working with the Committee and Congress in any way possible to assure the this important law, aimed at redressing a long history of injustice, be implemented effectively, equitably, and efficiently.

Sincerely,


Dan L. Monroe
Executive Director, Peabody Essex Museum
NAGPRA Review Committee member



American
Association
of
Museums

Statement of
William J. Moynihan, Ph.D.
President
Milwaukee Public Museum

On the Native American Graves
Protection and Repatriation Act
(P.L. 101-601)

Presented to the
Committee on Indian Affairs
U.S. Senate
December 6, 1995

Mr Chairman and members of the Committee: I am William J. Moynihan, Ph.D., President of the Milwaukee Public Museum, presenting written testimony on behalf of my institution and on behalf of the American Association of Museums

As you know, in 1990 Congress passed and President Bush signed the Native American Graves Protection and Repatriation Act (P.L. 101-601 -- "NAGPRA"). NAGPRA is remedial legislation enacted by Congress to ensure that Native American remains, funerary and certain other classifications of objects retained by the federal government and by the museum community are returned under the law to appropriate tribes and organizations for reburial or other appropriate care.

The Milwaukee Public Museum is committed to fulfilling both the letter and the spirit of NAGPRA. This commitment is reflected in museums across this nation. It is the law of the land, it is accepted by the museum community, and we in the museum world have benefited from new and productive relationships with Native American groups as a result of NAGPRA.

Allow me now a moment to describe the implementation of NAGPRA at the Milwaukee Public Museum as one specific example from the museum community. We are a mid-sized natural history museum with a budget \$8 million, an FTE staff of 135, and collections of approximately 4.5 million specimens and artifacts, with an especially strong collection of Native American material.

Our most recent permanent exhibit, "A Tribute to Survival," portrays a modern day powwow and has a strong Native American voice and interpretation within the exhibit. It is a source of pride for area tribes to such an extent that a local Native American group contributed \$250,000 to this project, and numerous individuals from the community were involved in the development of its content and approach.

Since NAGPRA was enacted, the Milwaukee Public Museum, previously a department of Milwaukee County, became a not-for-profit organization with its own Board of Directors. Our funding from Milwaukee County decreased by \$1.5 million between 1990 and the present, and the Museum ran large deficits in 1992 and 1993. The level of staffing has been reduced 27% since NAGPRA was enacted (between 1990-1995), budgets were cut, and programs lost. It is within this budgetary context that the Museum's extraordinary efforts to implement NAGPRA need to be understood and judged.

Our most recent estimates show that the Milwaukee Public Museum will have committed well in excess of half a million dollars by 1997 to deal with this legislation. Existing staff in our Anthropology/History Section have been reallocated from their normal duties to NAGPRA-related activities, a large team of volunteers assembled, and trained student interns and work-study students hired.

The task has been a daunting one. The Museum has been collecting anthropological and archeological material for over 100 years. The collections include approximately 50,000 catalogued items in the North American archaeology area and 22,000 in the North American ethnology area. The remains of 1,500 individuals are included.

Furthermore, the collections are not computerized, although efforts continue to secure the necessary funding. The records are uneven and extremely varied, reflecting changing professional standards over the 113-year history of the institution. Several moves in the history of the Museum have taken their toll on the records as have the ravages of time. Finally, this major effort was initiated at a time when the staff reductions and budget cuts previously mentioned were at their most severe.

Even given these difficult circumstances, the level of accomplishment at the Museum in implementing NAGPRA is laudatory. Much has been accomplished, and I would emphasize more than anything else the positive and productive relationships between the museum and Native American groups which have resulted from this entire process. In addition

- A physical inventory of over 22,000 Native American ethnographic objects in the collections was completed prior to the November 16, 1993 deadline.
- A preliminary inventory of the 50,000 archaeological objects was conducted;
- Letters were sent to several hundred tribes by July 1993 notifying them that the Museum held material attributed to their tribal group and that they could expect summaries to be sent by the November 16, 1993, deadline.
- Further research and phone contacts were used to identify the tribal affiliations of specific reservations or combined Native American communities when they could not be identified through Bureau of Indian Affairs and National Park Service Lists,
- Summaries of Native American collections were sent to 572 federally recognized tribes and native Alaskan and Hawaiian groups before the November 16, 1993, deadline. These summaries included a description of the objects, categories, date of acquisition by the museum, number of objects, and a list of any material originating in a tribe's general region but for which the Museum lacked specific provenance information.
- Phone calls were made to several hundred tribes to make sure the summaries had been received, to deal with any questions and to establish a human contact.

Since November 1993, work on NAGPRA has continued and even intensified. Our staff has responded to numerous letters and telephone inquiries from tribes regarding their summary letters. Detailed packets of information have been sent to tribal representatives.

We have gone beyond the requirements of the law by providing written documentation, photographs or drawings, and complete descriptions of objects as we have consulted with Native American groups. This has helped build a sense of credibility and confidence in our relationships with the tribes. The actual visits have been cordial and successful, and have given us a new understanding of the collections, but they have also been very time consuming for the staff. The staff has drawn upon this experience to make presentations to other museum professionals at meetings of the Midwest Museums Conference and the American Association of Museums, and has advised other museums of appropriate consultation methods and tribal visits.

During this time, the Milwaukee Public Museum has also taken a leadership role in providing to tribal museums not only advice on the care of collections, and on building and improving their museums, but also professional training for staff. As museum professionals, we feel a responsibility to the collections and their preservation, no matter who holds them.

The major focus of staff time since 1993 has been on the inventory of the North American archaeology collection, including human remains and associated funerary objects. This task proved to be even more complex than the previous work. The first step was a conventional physical inventory to ascertain the status of the archaeological collections in storage, on exhibit, and on loan, in comparison to existing catalogue records. Since the material was collected over a 100 year period, it was not organized according to any single system. Some of the collections were organized by locality, for example, where the only provenance was "Wisconsin." Others were grouped by type or broad regional traditions, such as "Old Copper Culture." And, of course, the collections were not computerized.

The staff then turned to a total physical inventory of the archaeology collections -- compiling detailed lists of contents of each drawer in storage, checking collections records, and verifying and correcting our records. Because of the poor state of records in this area of the collections, an enormous amount of time has been spent, but we do want to retain our credibility with Native American groups by providing complete and accurate information at the end of this phase of the NAGPRA requirements.

Despite our good faith efforts -- some might say because we did more than minimally required by the law -- and because of the size and condition of the archaeological collection, we have applied to the National Park Service for an extension of the November 16, 1995 deadline for the completion of inventories of human remains and associated funerary objects, and the consultation process which follows.

The Milwaukee Public Museum, like the museum community in general, has also been hampered in its progress by the delay in the publication of the final regulations. Since passage of NAGPRA, five years -- and both NAGPRA deadlines -- have passed and we still do not have final regulations. This has left us in an ambiguous situation, not knowing if we are, in fact, in full compliance and spending a great deal of time consulting with colleagues at other institutions to determine consistent interpretations and definitions of the law. Even

the most basic definitions -- such as what constitutes a "tribe" -- have changed in the draft regulations and will have important implications to us when finally determined.

Let me say a few words about the national situation. In 1994, the American Association of Museums surveyed 500 of its member institutions, including all of its natural history museums and a selected sample of its art and history museums. The survey response rate was 43.6%. Of those responding, 76% of the natural history museums, 43% of the history museums and 23 % of the art museums had Native American objects. Those respondents -- a little more than 200 -- alone had almost 3.5 million objects which fell into NAGPRA categories, and that does not include 15 responding natural history museums, including three large institutions, which could not give an estimate of their NAGPRA-related holdings. An overwhelming number of these institutions suggested that a national clearing-house be established for such information as lists of tribes -- with examples of what those tribes consider to be sacred objects or objects of cultural patrimony -- and lists of experts who can be consulted, as well as noting how the lack of final regulations and of NAGPRA grant funding has hindered or prevented their repatriation efforts.

All sizes of institutions showed large numbers of objects. Among small history museums, 65 responded, with 31 affected. This is in a context of 4,500 history museums nationally, of which 90% are small.

Estimating aggregate costs is not possible from the survey data, given the great disparities in how institutions calculated their own costs. It is clear, however, that thousands of institutions across the country are affected to some degree by NAGPRA costs.

We understand that the Native American community is also incurring major expenses in attempting to comply with the requirements and deadlines of NAGPRA.

In closing, I respectfully submit that there are two major impediments now faced by museums and by Native American tribes and organizations in carrying out the intent of Congress. First, the long-delayed regulations have still not been published in final form as this testimony was being written, although I understand that such publication may be imminent. There are great complexities in the implementation of NAGPRA, and many ambiguities. Museums and Native American groups need the final regulations. I would respectfully request that the Committee encourage the Administration finally to issue the regulations.

Second, museums and the Native American community have faced great costs in implementing NAGPRA. In the case of the Milwaukee Public Museum, and in many other cases, this burden has come at a time of budget and staff reductions. The Congressional Budget Office in 1990 estimated NAGPRA would cost museums \$40 million and Native American tribes and organizations between \$5-10 million over five years. We now know from experience that these estimates were too low. The \$2.3 million now competitively available to museums and Native American groups through the National Park Service's NAGPRA grant program does not come close to providing the supplemental support needed.

to implement NAGPRA. For example, I understand that the National Park Service awarded 83 NAGPRA grants totaling \$4.37 million for fiscal years 1994 and 1995, but in doing so they received 337 grant proposals requesting just short of \$30 million. In the case of the Milwaukee Public Museum, no federal funds have been awarded. In light of these facts, I would respectfully request that the Committee urge the Department of Interior to increase its budget request annual funding at least to the level of \$10 million per year.

Thank you for this opportunity to testify. I would be happy to respond to any questions you might have.



American
Association
of
Museums

September 27, 1995

The NAGPRA Review Committee
c/o Archaeological Assistance Division
National Park Service
Box 37127, Suite 120
Washington, DC 20013-7127

Dear Review Committee Members:

The American Association of Museums, which represents the full range of the nation's museums, including natural history, history, art and other kinds of museums with NAGPRA-related holdings, appreciates the opportunity to comment on the Review Committee's current draft recommendations on the disposition of culturally unidentifiable human remains and associated funerary objects. The Review Committee and the National Park Service have been very conscientious about soliciting a wide range of interested opinions on this and other NAGPRA issues, and the museum community has been grateful for these opportunities.

First I would like to make some general comments. It is particularly important that the Review Committee has been open to comment because of the background of NAGPRA. As you know, the creation of NAGPRA initially created great controversy, and the final result, arrived at by difficult and detailed negotiations of the affected parties and Congress, was a compromise with which no party was perfectly pleased but with which all parties could abide. Central to that delicately balanced compromise--where virtually every word was weighed, and key terms carefully defined--was an encouragement in many places in the law, a preference, for tribes and museums to work out their own arrangements via mutual consultations.

Given this background, the museum community has cause for concern in some of the assumptions and other elements in the current draft recommendations.

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General issues.

1. Disposition of culturally "unidentifiable human remains." As the draft recommendations point out, the disposition of culturally unidentifiable human remains is left open in NAGPRA. It also seems clear in the law that control of human remains and associated funerary objects will go to culturally affiliated tribes and lineal descendants.

However, the very silence of the framers of the law on the ultimate disposition of unidentifiable human remains, contrasted to the explicit rules for identifiable human remains, is important. Proper respect for human remains is not at issue here. Where cultural or lineal affiliation can be made under the terms of the law, the law seems to assume that respect can best be paid by those so affiliated.

Where that cultural affiliation or lineal descent cannot be determined, and especially in the case of ancient peoples, the situation becomes more complex. Different tribes currently existing have widely differing rules for the proper treatment of the dead; adding the dimension of the cultural practices of tribes existing in the past adds to the complexity. Under these circumstances, it is easily possible to see a situation where human remains might be interred in complete contradiction to the cultural beliefs of the interred. Whose rules should prevail?

This is not to deny the appropriateness of Native American consultation on this issue but to say that the current general statement in the draft that final disposition of unidentifiable human remains rest with unspecified Native Americans should be set aside for the moment and more thought be give to the details of this issue in a subsequent draft.

It may be that this issue, as in many places elsewhere in the law, should be resolved on a case-by-case basis between museums and tribes. It may also be useful for the Review Committee explicitly to encourage exhaustion of all means of establishing cultural affiliation or lineal descent, including, for example, DNA testing of remains compared to current human populations, that do not contravene important religious principles of what are the most likely related groups, to attempt to move as many cases as possible from the unidentifiable to the identified category.

2. Disposition of funerary objects associated with culturally unidentifiable human remains. Again, an important way of dealing with this issue would be explicitly to encourage the use of all means of establishing cultural affiliation of the

human remains consistent with Native American practices as noted above. This would remove as many of the associated funerary objects as well as the human remains into the categories already covered by the law.

For the remainder--those funerary objects associated with human remains which truly cannot be culturally identified--we believe that additional legislation would be necessary, as the draft suggests may be so. As noted above, the framers' silence in this area implies intent: while associated funerary objects and human remains are elsewhere explicitly mentioned together, the law does not mention associated funerary objects when discussing unidentifiable human remains, and neither the law nor regulations requires their inclusion in inventories.

3. The effect of the current draft recommendations on consultation between the tribes and museums. As noted above, a central element in many parts of the law is the encouragement of consultations between the tribes and museums in the NAGPRA process, and encouragement of agreements for disposition which flow from such consultations. The effect of much of the Review Committee's current draft recommendations would be to centralize more the decision making in Washington than seems contemplated in the law. Such consultations are vital not only for the operation of the law but for strengthening and maintaining a two-way flow of knowledge between museums and tribes and for increased understanding of Native American culture.

For example, in the discussion of ancient remains (pp. 4-5, section 2), the Review Committee, not museums, would take responsibility for notifying tribes potentially affiliated. Similarly, creation of National Park maps ("procedures for identification of potential claimants," option 1) again undercuts the authority of museums and tribes.

We would ask that subsequent drafts of the recommendations be surveyed with an eye to enhancing rather than diminishing opportunities for such consultations.

4. Regional cemeteries or mausoleums. A potential drawback here is that these might prevent the possibility of some current or future scientific process, such as DNA testing, from being used, with the consensus of proper parties, to determine true affiliation. (Use of such evidence has, in recent years, provided a very strong "voice for the dead" in many criminal trials.)

Draft Procedures.

These procedures assume the return of unidentifiable remains and objects. We think that that assumption needs further thought, for the reasons noted above. However, if the Review Committee were to move forward with procedures, the following options would be preferable.

Procedures for identification of potential claimants. Option 2 seems an overbroad and huge effort, to which many tribes will likely not have the manpower or funds to respond. We prefer Option 1, although creation of the NPS maps may be very difficult, and it would be better to find another way to accomplish the purpose that would put museums and tribes back into the center of decisions. After steps 1 and 2 of Option 1, the tribes should request repatriation from museums and Federal agencies, not the National Park Service--again to maximize the ongoing consultation opportunities.

Procedures for reviewing claims. Again, Option 2 is clearly preferable since it maximizes the chances for consultation between museums or Federal agencies and the tribes, as contemplated elsewhere in the law.

Procedures for making repatriations to Native American groups without BIA recognition. As noted in the draft recommendations, the term "Indian tribe" for the purposes of the Act includes groups "eligible for the special programs and services provided by the United States to Indians because of their status as Indians," and the Department of the Interior has interpreted that as equivalent to groups formally recognized by the Bureau of Indian Affairs as "tribes." This existing definition and interpretation affects not only culturally unidentifiable human remains but all other aspects of the application of the law. Thus, to open up the definition for the purpose of dealing with culturally unidentifiable human remains would be to open up many other issues, including museums' potential liability for breach of public trust for recognizing groups outside the law.

Yet the Committee points out an important situation: where "There are remains that can be directly traced by a preponderance of the evidence to tribes, villages, communities of Native Americans that may not be formally recognized by the Bureau of Indian Affairs as 'Tribes.' In these cases, the remains are only 'unidentifiable' because of the wording of the Act."

In such a situation, the affected tribe could be encouraged to apply for formal recognition by the BIA. Barring that option, we believe that the law is straightforward, and going further would require a statutory change.

Again, we appreciate the opportunity to comment, and we look forward to continuing the dialogue about subsequent drafts of the recommendations.

Sincerely,

Jason Y. Hall
Jason Y. Hall
Director
Government and Public Affairs

cc: Nina Archabal, AAM Chair
Edward H. Able, Jr., AAM President
Patricia Williams, AAM Vice-President, Policy and Programs
Andy Finch, AAM Assistant Director, Government and Public
Affairs
Roxanna Adams, AAM Coordinator, Technical Information Service



American
Association
of
Museums

January 22, 1996

The Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Mr. Chairman:

Thank you very much for giving the museum community an opportunity to testify at the December 6 hearing on implementation of the Native American Graves Protection and Repatriation Act.

In response to your letter of December 15, posing additional questions for the record, AAM would like to make the following comments:

1. Question: Do you believe that the Department of the Interior adequately consulted with the museum community during the development of the draft and Final regulations? Do you have any comments on the content of the Final regulations?

Answer: We believe that the Office of Archaeological Assistance at the National Park Service, which is the part of the Department tasked with administering the law, has made extensive efforts to consult with the museum community and with the other parties to the law. The difficulty has not been there but with the slow pace of approval of the regulations elsewhere in the Department and the Administration. The final regulations are not exactly as we would have wanted them, but, as with the underlying law itself, they reflect an acceptable compromise with which the museum community is prepared to comply so that the process mandated in the law can go forward in as timely a way as possible.

2. Question: What is the opinion of the American Association of Museums regarding the disposition of unidentified and unclaimed human remains? Do you believe the Secretary of Interior should promulgate regulations regarding this issue?

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Answer: As you know, this is an issue which has come under discussion before the NAGPRA Review Committee, which has requested comments from the chief parties to the law on an initial proposal. AAM has responded to Review Committee in detail; I am enclosing a copy of those comments, for your information. Given the number of unresolved fundamental issues in this area at this time, we urge strongly that the Secretary not issue regulations on this matter at this time but rather, as the Review Committee itself indicated, continue to try to resolve some of these fundamental issues first.

3. Question: Do you know of any case examples of tribes and museums developing a cooperative agreement to protect confidential information regarding the sacredness of ritual ceremonies and objects?

Answer: None has come to our attention to date.

On the questions regarding the Federal District Court case
Na Iwi O Na Kupana O Mokapu, Heleloa, Ulupa'u A Me Kuwa'a'oh v.
John Dalton:

1. Question: One of the issues the plaintiffs in the action raised was whether the Freedom of Information Act applies to information derived from the development of the inventory of Native Hawaiian remains authorized by the Native American Grave Protection and Repatriation Act. The court found that the Freedom of Information Act (FOIA) applied to the inventory information, and that no exemption under FOIA would protect that information from public disclosure.

The Committee is interested in securing your views on: (1) whether such information, derived from the NAGPRA inventory process, should be subject to public disclosure; (2) whether the Congress should act to amend NAGPRA to provide protection from public disclosure of information derived from NAGPRA inventories; (3) whether protection from public disclosure of information derived from NAGPRA inventories should be limited in scope, and if so, in what respect; and (4) whether NAGPRA inventory information should be exempted from application of the Freedom of Information Act.

Answer: We believe that, consistent with NAGPRA as it stands and with FOIA, information derived from the NAGPRA inventory process should be subject to public disclosure, and that NAGPRA should not be amended to restrict that

disclosure, nor should NAGPRA inventory information be exempted from FOIA. As the Federal Court indicates, the presumption behind FOIA is that maximum disclosure of Federal information is in the best interests of the country except in a handful of specific cases laid out in FOIA. Thus there would need to be a very powerful public policy reason to override that intent in NAGPRA, and that test has not been met.

In addition, we see a logical problem in moving from full disclosure. Limiting information in the inventory to release to only one "privileged" tribe or group would very likely prevent other tribes with potentially valid claims to objects from being able to know that they might claim ownership.

Finally, we agree with the Court that privacy tests are not met with repatriable items, and given that fact, there are not good reasons to amend NAGPRA to become a "withholding statute" under FOIA definitions, with an explicit special exemption from FOIA.

2. Question: Section 3003(a) of NAGPRA requires each Federal agency and each museum possessing Native American human remains and associated funerary objects "to compile an inventory of such items, and to the extent possible based on information possessed...identify the geographical and cultural affiliation of such item."

Section 3003(b)(2) of NAGPRA states that upon request of an Indian tribe or Native Hawaiian organization, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a). This subsection also defines "documentation" as meaning a summary of "existing museum or Federal agency records" and further notes that the term does not mean, nor authorize "the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects."

The district court also ruled that "further examination" of the remains was legally permissible, and "impliedly approved" by the Congress, despite the fact that neither the geographical nor cultural affiliation of the remains was in question.

- (a) In your opinion, does NAGPRA, as currently enacted, sufficiently address the issue of necessary scientific

studies which may be initiated during the course of compiling an inventory pursuant to NAGPRA?

Answer: Yes. As the Court found, Congress explicitly anticipated, and left considerable room for, studies prior to completion of the inventory to aid in the inventory process, and the law also provides in Sect 11(1)(B) for agreements between culturally affiliated tribes and museums on the repatriation process which could include agreements on scientific studies.

(b) NAGPRA defines neither "inventory" nor "scientific studies" nor "scientific information." Do you believe that such definitions may be warranted, given the district court's ruling?

Answer: No. "Inventory" is defined already in Sect 5(e), and "scientific studies" and "scientific information" are sufficiently clear, while additional attempts to define the terms legislatively would complicate the implementation of the law. If further refinements of definitions become necessary as specific circumstances arise, the NAGPRA Review Committee could recommend them, in consultation with the museum and tribal communities, as part of its duties under NAGPRA to help make the process work.

(c) In your opinion, under what circumstances, if any, would further scientific studies, either during the course of compilation of an inventory or after the conclusion of such an inventory, be warranted?

Answer: We do not think that a comprehensive list of when such studies may be necessary can be compiled at this time. Circumstances which no one can currently anticipate are likely to arise as the repatriation process continues. However, such a list would include cases where other practical means of establishing cultural affiliation had been exhausted; where the process created by the law could not otherwise move forward, as in the case considered by the Court; and where the culturally affiliated tribe and the museum had agreed that the studies should proceed, consistent with Sect 11(1)(B). Again, any clarification which might be needed here would probably best be undertaken by the NAGPRA Review Committee, in consultation with the museum and tribal communities.

3. Question: The plaintiffs in the action also sought to assert protection for Native Hawaiian human remains in a

guardianship capacity, but the district court found that NAGPRA does not authorize legal actions in that capacity.

In your view, should the Congress amend the Act to provide authority for legal actions to be brought by those who may qualify to serve as guardians for purposes of invoking the protection of the Act on behalf of Native American human remains?

Answer: No. There are legal consequences that would arise for other bodies of law where guardianship has been defined. In addition, there would be an important logical problem: how would one determine who would have standing as guardians, especially where there are multiple claims for repatriation? Finally, as the District Court points out, even if Congress granted guardianship in NAGPRA, the human remains would still not have legal standing under common law requirements, and without such standing, as the Court notes, "discussion of about any kind of guardianship...is moot."

The museum community appreciates the Committee's interest in seeing that the implementation of NAGPRA proceeds as effectively as possible and for the opportunity to comment on these questions.

Sincerely,

Jason Hall
Jason Hall
Director
Government and Public Affairs

cc: Edward H. Able, Jr., AAM President and CEO
Nina Archabal, AAM Chair
Dan Monroe, Immediate Past AAM Chair and Member, NAGPRA
Review Committee
William Moynihan, President, Milwaukee Public Museum
Patricia Williams, AAM Vice President, Policy and Programs
Roxana Adams, AAM Coordinator, Technical Information Service
Andy Finch and Kristi Walker, AAM Government and Public
Affairs staff

(with incoming letter)

STATEMENT OF TESSIE NARANJO, MEMBER and CHAIRPERSON,
REVIEW COMMITTEE, NATIVE AMERICAN GRAVES PROTECTION AND
REPATRIATION ACT, BEFORE THE SENATE COMMITTEE ON INDIAN
AFFAIRS REGARDING THE STATUS OF IMPLEMENTATION OF
NAGPRA

December 6, 1995

I am Tessie Naranjo an Indian person from Santa
Clara Pueblo, New Mexico. I appreciate the opportunity
to offer testimony as member and Chairperson of the
National Review Committee for NAGPRA.

The individuals selected in Spring 1992 to serve
as Review Committee members have worked for four years
meeting at least twice each year working on various
aspects of NAGPRA such as refining the Regulations
which implement the statute. These Regulations have
just been published in the Federal Register. Other
activities of the Review Committee include consider-
ation of five dispute cases, oral testimony from 93
individuals during 1992-1994, many of whom represented
Indian tribes or are of Indian descent. At our last
meeting in Anchorage, Alaska, October 16-18 of this
year, we discussed the 120 written comments received on

our draft recommendations regarding the disposition of Culturally Unidentifiable Human remains and Associated Funerary Objects.

We have experienced frustrations over a number of issues. These frustrations and concerns became the recommendations in our 1993/1994 Report to Congress. What I wish to do now is summarize these recommendations:

1. That Congress clarify the meaning of "Indian Tribe" within NAGPRA in order to permit Native American groups not presently recognized by the Department of Interior Bureau of Indian Affairs to repatriate their human remains, funerary objects, sacred objects, or objects of cultural patrimony.
2. That Congress appropriate at least \$10 million for FY96 to help Indian tribes, Native Hawaiian organizations, museums, and universities in complying with NAGPRA directives.

3. That Congress take steps to assure that the Smithsonian complies with all NAGPRA requirements.
4. That Congress consider legislation to protect Native American and Native Hawaiian graves located on state or private lands from grave robbing and other kinds of destruction.

I wish now to make comments with regard to funding. For FY1994 and FY1995, the total amount of NAGPRA grants was under five million dollars and the total request from tribes and museums was thirty million dollars. The number of grant requests will increase with this coming Fy1996 grant applications. We need increased funding for the grant program.

Increased funding is also needed for the costs involved in Federal Register notices due to the increased number of inventory notices of Human remains and Associated Funerary Objects. One of the effects will be the inundation of work related to the documentation of these inventories of human remains by

the NAGPRA administrative staff and the Review Committee.

We expect that as the inventory notices increase the number of disputes will rise. Disputes always prolong conflicts and involve the time of the limited NAGPRA staff. It also requires more consideration of dispute hearings by the Review Committee.

Additionally, more funding is needed by the NAGPRA staff to implement the Civil Penalties section currently being reviewed by the Department. This section deals with those individuals and institutions who are in non-compliance. Investigative work is a crucial process in determining non-compliance.

Our recommendation in our 1993/1994 Report to Congress was that it appropriate \$10 million in FY1996 to continue to implement the Native American Graves Protection and Repatriation Act. This amount is absolutely essential if we are to effectively carry out the intent of NAGPRA.

Lastly, Mr. Chairman I want to make mention that the Keepers of the Treasures, a national organization

promoting cultural preservation of tribes is in support of the efforts of the NAGPRA staff and the Review Committee and supports our request for \$10 million for FY 1996. Thank you.

February 1996

Questions by Senator John McCain, Chairman, Senate Select Committee on Indian Affairs, responses by Tessie Naranjo, Chairperson, Native American Graves Protection and Repatriation Act.

1) Do you feel that the Review Committee and the Department of Interior adequately consulted with Indian tribes during the process of developing the final regulations to implement the Act?

Yes. The Review Committee has held a total of ten meetings since April 1992. We deliberately held these meetings around the country to give an opportunity for tribal people to attend Review Committee meetings and to make comments about NAGPRA concerns. Additionally, several draft regulations were sent directly to tribes for comments.

1a) What specific efforts have been taken by the Department to consult with Indian tribes in the development of these regulations?

-Review Committee meetings provided an opportunity for testimonies from tribes.

-As draft regulations were completed these were distributed to Indian tribes for comments.

2) Can you provide to the Committee a summary of the five dispute cases that you referenced in your testimony?

1. Univ.Calif., Hearst Museum vs Hui Malama
2. Marine Corps vs Hui Malama and others
3. Oneida vs Oneida vs Chicago Field Museum
4. Santanta descendants vs Univ.Calif., Hearst

3) Following four questions related to the Federal District case, Na Iwi O Na Kupuna O Mokapu, Heleloa, Ulupa'u A Me Kuwa'a'ohi vs John Dalton:

a) Should such information, derived from the NAGPRA Inventory process be subject to public disclosure?

Information derived from the NAGPRA Inventory process should not be subject to public disclosure. This information is basic and is meant to give just enough information in order for tribes to make decisions about human remains.

b) Should Congress amend NAGPRA to provide protection from public disclosure of information derived from NAGPRA inventories?

No, Congress does not need to amend NAPRA in order to provide protection from public disclosure.

c) Should protection from public disclosure of information derived from NAGPRA inventories be limited in scope and if so, in what respect:

This question appears to be another version of above question. My response was, no, Congress does not need to amend NAGPRA to provide protection from public disclosure of information

d) Should NAGPRA inventory information be exempted from the application of the FOIA?

No.

4) In your opinion, does NAGPRA, as currently enacted, sufficiently address the issue of necessary scientific

studies which may be initiated during the course of the compiling of an inventory pursuant to NAGPA?

The law requires a minimum amount of information for inventories (i.e., acquisition date, description such as dimensions and antiquity of human remains). This section does not discuss the issue of scientific studies but in another section the law says, scientific studies can be conducted when it is of "major benefit to the U.S.".

5) NAGPRA defines neither "inventory" nor "scientific studies" nor "scientific information". Do you believe that such definitions may be warranted given the district court's ruling?

NAGPRA defines "inventory" as "...the item-by item description of human remains and associated funerary objects". Neither "scientific studies" or scientific information" is defined nor is it used in the law - no definition is required.

6) In your opinion, under what circumstances, if any, would further scientific studies, either during the course of compilation of an inventory or after the conclusion of such an inventory, be warranted?

The law says when it is of major benefit to the U.S.

7) In your view, should the Congress amend NAGPRA to provide authority for legal actions to be brought by those who may qualify to serve as guardians for purposes of invoking the protection of the Act on behalf of Native American human remains?

This is a question which cannot be answered with a "yes" or "no". Who is the "guardian"?

TESTIMONY SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS:

OVERSIGHT HEARING ON IMPLEMENTATION OF THE
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

PUBLIC LAW 101-601

January 18, 1996

Kūnani Nihipali, Po'o

I am Po'o (leader) of Hui Mālama I Nā Kūpuna 'O Hawai'i Nei (Hui Mālama), a Native Hawaiian organization dedicated to the care and protection of ancestral Native Hawaiian remains. Our kumu are Edward and Pualani Kanahale of Hilo.

Pursuant to NMAI and NAGPRA, Hui Mālama has repatriated and reinterred ancestral Native Hawaiian remains and funerary objects from the Smithsonian National Museum of Natural History, Bernice Pauahi Bishop Museum, American Museum of Natural History, Field Museum of Natural History, University of Alaska Museum, Brigham Young University Museum of Peoples and Cultures, Milwaukee Public Museum, San Diego Museum of Man, University of Pennsylvania Museum of Archaeology and Anthropology, Sacramento Science Center, Peabody Essex Museum, University of California Hearst Museum, University of Oregon Museum of Anthropology, Harvard Peabody Museum of Archaeology and Ethnology, Yale Peabody Museum of Natural History, Dartmouth Hood Museum of Art, Earlham College Moore Museum, and Los Angeles County Museum of Natural History.

Internationally, Hui Mālama was repatriated ancestral Native Hawaiian remains and burial objects from the Royal Ontario Museum (Toronto, Canada), Universitat Zurich-Irchel Anthropologisches Institut Und Museum (Switzerland) and South Australian Museum.

In 1995, Hui Mālama filed suit against the U.S. Navy and Bishop Museum for violating NAGPRA by conducting scientific studies on over 1,500 ancestral Hawaiians thereby failing to expeditiously repatriate. The remains originated from Mōkapu, Heleloa, Ulupa'u and Kuwa'a'ohē, Ko'olaupoko district, O'ahu.

Hui Mālama sought to have the scientific information recorded from these ancestral Hawaiians expunged from the NAGPRA inventory report published by the Navy. We viewed the scientific studies as unnecessary since cultural affiliation was already known by a reasonable belief to be Native Hawaiian, and more importantly, as personal violations of the integrity and sanctity of these ancestors.

In our view, the scientific studies were outright violations of *kanawai* (Hawaiian law), amounting to a theft of *mana* (energy). The law suit sought to delete the scientific information in order to help restore that *mana* to the ancestors which is necessary for their spiritual well being. Protection of the *mana* of the Mōkapu ancestors is part of the responsibility to *mālama* (care for).

However, the district court found that the conduct of scientific studies by the U.S. Navy on the Mōkapu remains did not violate NAGPRA and instead is consistent with NAGPRA's goal of identifying remains for repatriation. Moreover, the court said Congress impliedly approved further research on human remains during the inventory in order for museums and federal agencies to better comply with NAGPRA's identification and repatriation requirements.

The court ruled that the Mōkapu inventory is subject to the disclosure requirements of the Freedom of Information Act ("FOIA") as none of the FOIA exemptions were applicable. The court found that NAGPRA does not contain any language evincing a legislative intent to limit disclosure of inventory information.

The court's ruling will allow unnecessary desecration of ancestral Hawaiian remains already disturbed from sacred burial sites. The adverse effect on the living includes placement of a heavier burden on those who accept the responsibility to *mālama i nā iwi kūpuna* (care for the ancestral bones).

As a result of the court's decision, Hui Mālama offers the following recommendations for the Committee's consideration. These recommendations are intended to further strengthen the civil rights nature of this important legislation.

I. The Role of Scientific Study Must Be Clarified

NAGPRA should be clarified to state that where existing documentation establishes geographic location and cultural affiliation either by clear, reasonable belief, or the preponderance standard of evidence, scientific studies of any kind on ancestral skeletal remains are prohibited. Furthermore, scientific study or any other form of recording or preserving scientific information from human skeletal remains during the NAGPRA inventory process should only be allowed when existing documentation fails to satisfy any of the applicable NAGPRA standards of identification.

Acquisition of scientific information from possible Native Hawaiian remains should only be allowed where a thorough review of all existing information possessed by a museum or agency fails to establish cultural affiliation by a reasonable belief and where the additional evidence provided by a Native Hawaiian organization fails to satisfy the preponderance standard.

The scope of any scientific study deemed to be necessary to establish cultural affiliation and initiated during the inventory process must be strictly limited to the determination of cultural affiliation by a preponderance. Since the preponderance of evidence is not a high standard, only minimal scientific information should be allowed to be acquired. Once the information acquired establishes cultural affiliation to be more likely than not, the inquiry must end.

Recording of scientific information not related to, or in addition to, the establishment of cultural affiliation should be clearly prohibited. Necessary scientific study must be viewed as a last resort in the NAGPRA identification process.

Furthermore, scientific study to clarify cultural affiliation should only be conducted where the museum or federal agency and Tribe or Native Hawaiian Organization agree that none of the NAGPRA identification standards have been satisfied based on available documentation evidence, or after the matter is submitted to the NAGPRA Review Committee as a dispute, the Committee recommends scientific study, and the parties agree.

Since treatment of ancestral remains is and will always be a fundamental attribute of sovereignty and self-determination, the aforementioned concerns should be framed as a consensual issue allowing for those Tribes or Native Hawaiian organizations who, once cultural affiliation is established, wish to have additional scientific studies conducted, may elect to do so. This way, those Tribes and Native Hawaiian organizations who object to

further scientific study will have their wishes respected as well the wishes of those who request additional study.

In addition, the terms "scientific study" and "scientific information" need to be defined. Scientific study should be limited only to the observation of metric and non-metric traits necessary to help suggest ethnicity by a preponderance of the evidence. Destructive analysis methods such as mitochondrial DNA analysis and radio carbon dating, as well as x-rays should be strictly prohibited.

Following review of the recently promulgated NAGPRA regulations, Hui Mālama believes there is a further need to clarify the inventory process to avoid unnecessary scientific study.

NAGPRA defines "inventory" to be a "simple itemized list" and section 10.2(g)(2) of the regulations further defines the term to be an "item by item description of human remains and associated funerary objects." Section 10.9(c)(3) provides that information required in the inventory of human remains and associated funerary objects include "dimensions" and "if appropriate, photographic documentation."

Hui Mālama is concerned that the term "dimensions" may be applied to human remains and interpreted to include measurements, a form of scientific study. The regulations seem to require a form of scientific study of human remains during the inventory process, despite the fact that cultural affiliation may be otherwise established by existing documentation.

Finally, for the reasons stated above, this Committee should consider deleting NAGPRA section 7(b) relating to completion of scientific study "the outcome of which is a major benefit to the United States."

The aforementioned recommendations will help clarify the role of scientific study in the inventory process and provide for limited studies to clarify cultural affiliation only when necessary.

II. Photography of Native American Human Remains Should be Expressly Prohibited Unless Consent Provided

In addition, Hui Mālama is concerned as to whom finally decides whether photographic documentation is appropriate and what criteria controls such a determination. Our experience has shown that museums in possession of ancestral Native Hawaiian remains ultimately decide this issue, regardless of any objections raised.

Hui Mālama views photographs as another offensive form of taking *mana*. We strongly urge the Committee to amend NAGPRA to provide a clear prohibition on the photography of Native American human skeletal remains absent establishment of cultural affiliation and only upon the express consent of the culturally affiliated Tribe or Native Hawaiian organization.

III. NAGPRA Should Be Amended to Become a Withholding Statute

NAGPRA inventories contain certain sensitive information including burial location and measurements and descriptions of human remains where scientific studies are conducted to clarify cultural affiliation. Persons interested in grave robbing, may

use the locational information to find extant burial sites. Moreover, as a matter of personal privacy, persons not culturally affiliated to ancestral remains should not have the right to access information derived from scientific studies.

Due to this sensitivity and the potential for harm, Hui Mālama believes that those Tribes and Native Hawaiian organizations who wish should have the right to prevent public disclosure of certain types of inventory information. Once cultural affiliation is established, the culturally affiliated Tribe or Native Hawaiian organization should have final say over treatment of sensitive inventory information, as a fundamental right and as a function of their inherent sovereignty.

Therefore, we urge the Committee to consider amending NAGPRA to explicitly state in unambiguous terms that burial location information and any information derived from a scientific study conducted during an inventory to clarify cultural affiliation shall not be released to the public, but instead be kept confidential. Such an amendment will help qualify NAGPRA as a withholding statute for FOIA purposes.

IV. Congress Needs to Appropriate Adequate Funding to Implement NAGPRA

Congress has appropriated only \$ 4.37 million for grants to museums, federal agencies, Tribes and Native Hawaiian Organizations to implement NAGPRA. One important aspect of the NAGPRA process that is adversely affected by the lack of adequate funding is consultation.

In order for consultation between federal agencies, museums

and Tribes and Native Hawaiian Organizations to be meaningful, for accurate information to be communicated back and forth, face to face meetings and inspections of cultural items are imperative. Congress needs to stand by the intent of NAGPRA and providing more meaningful funding by doubling appropriations for the next three years. Only then will the difficulties surrounding repatriation be sufficiently addressed and justice extended to those ancestors adversely affected by the past through removal from sacred burial sites.

V. NAGPRA Should Provide the Remains and Guardians with Standing

The district court concluded that the ancestral Hawaiian remains which Hui Malama sought to protect from further desecration did not have standing to sue in their own capacity because: 1) NAGPRA did not expressly confer standing on the remains, and 2) the remains did not suffer an "injury-in-fact" recognized at law. As the district court wrongly noted,

Objects or entities without any attributes of life in the observable or provable sense are generally not afforded a legally-protected interest for standing purposes.

Na Iwi v. Dalton, 894 F. Supp. 1397, 1407 (D. Haw. 1995). As testified extensively by Hui Malama's witnesses, our ancestral remains are considered "persons" that deserve our utmost care and respect. The district court clearly showed its discrimination in favor of legally-recognized western "injuries" when it remarked that inanimate object, such as ships and corporations, had standing to sue in their own behalf because they "are legal fictions created for the benefit of our society...[and would] facilitat[e] business and commerce, which in turn furthers societal interests and benefits individual persons." Na Iwi, 894 F. Supp. at 1407. Protecting our kupuna, under Hawaiian tradition and custom, serves an equally useful purpose that benefits our society. According to tradition and custom, our ancestors have been injured by disrupting their journey to the afterlife. Failure to protect our ancestors on their peaceful journey to the afterlife will mean repercussions for the living, including members of Hui Malama. Accordingly, this Congress can correct this omission by amending NAGPRA to reflect the importance of ancestral remains to living native Americans by

allowing the remains to sue on their own behalf.

Moreover, the district court concluded that Hui Malama does not have standing to sue as guardians on behalf of the ancestral native Hawaiian remains because: 1) NAGPRA does not confer guardian status on Hui Malama, and 2) tradition and custom under Hawaiian law did not dictate that Hui Malama become the sole guardian of the remains. The district court erred in its analysis. Tradition and custom dictated that a Hawaiian individual or organization protect their ancestors from being robbed of their spiritual mana, or power during the inventory process. Hui Malama was not seeking status as a legal guardian, but simply as a "spiritual" guardian or advocate on behalf of the remains. The Federal defendants could not disprove, nor were there any Hawaiian individual organizations who came forward to object to, Hui Malama's claim to advocate as "guardian" on their behalf. Recognizing the importance of Native American and Hawaiian beliefs that remains are simply not "cultural items", but rather as living persons capable of suffering injury to their dignity, reputation, etc. Accordingly, NAGPRA should be amended to allow native American tribes and native Hawaiian organizations the right to represent their ancestors in court.

Supplemental Testimony Submitted to
Senate Committee on Indian Affairs
Concerning Oversight Hearing on
Implementation of P.L. 101-601, December 6, 1995
Native American Graves Protection and Repatriation Act

by

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SUPPLEMENTAL TESTIMONY
SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING, DECEMBER 6, 1995
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

The Native American Rights Fund (NARF) is a public interest, nonprofit law firm dedicated to serving the legal needs of Indian tribes and Native Americans. As a nationally-oriented law firm, NARF has represented several Indian tribes and one tribal official in state and federal repatriation matters over the course of the last decade. NARF submits the following supplemental testimony in conjunction with two clients, the Pawnee Tribe of Oklahoma and Judi Morgan, former repatriation officer of the Ponca Tribe of Nebraska. This supplemental testimony is submitted in response to the request of the Honorable John McCain, chairman of the Senate Indian Affairs Committee.

Scope of Final NAGPRA Regulations

We endorse and adopt the distinguished testimony of the American Indian Ritual Object Repatriation Foundation (AIRORF) regarding the development and scope of the final regulations implementing NAGPRA.

NAGPRA Inventory Process and Further Scientific Studies

Congress needs to amend NAGPRA to unequivocally and expressly prohibit any further scientific studies of human remains and associated funerary objects, at a minimum where cultural affiliation is known or can be determined based upon a preponderance of existing information. In most cases, museums have retained the dead bodies and funerary objects of Native ancestors for decades. They therefore have had ample time to conduct whatever studies they felt were necessary.

However, it still seems to escape certain museums and social scientists that their "scientific specimens" are the remains of human beings, some who were buried during the late nineteenth century--the recent past considering that such

are the remains of grandparents of some Native people living today. To many Indian tribes and Native peoples, the dead are sacred. Any disturbance of the dead (or their funerary objects) is a sacrilege. This includes "further scientific studies." Such sacrilegious mistreatment is deeply offensive and inflicts real pain on Native peoples, communities and tribes. Congress has a responsibility to see that this does not happen.

Moreover, "further scientific studies" where cultural affiliation is known has caused needless, acrimonious controversy between Indian tribes and museums, which can culminate in unnecessary, costly legal expenses and litigation. A prime example is the current conflict involving the Ponca Tribe of Nebraska, the Ponca Tribe of Oklahoma and the University of Nebraska.

Briefly stated, the University of Nebraska, under the auspices of Professor Karl Reinhard, conducted destructive analyses on Ponca remains--when there was never any question about cultural affiliation. The Ponca Tribes protested this outrageous conduct. The Ponca Tribe of Oklahoma threatened to sue the University for performing the unauthorized destructive analyses. See Exhibits 1 and 2.

Although the University of Nebraska ultimately placed a moratorium on destructive testing, the damage to the remains and the living Ponca descendants and tribes had been done. Judi Morgan, the repatriation director of the Ponca Tribe of Nebraska, described her opinion of Reinhard's work as "insensitive," "distasteful," "dehumanizing" and "disrespectful." She further suggested that Reinhard's destructive analyses may constitute possible violations of NAGPRA. Reinhard's attorney wrote an intimidating letter threatening to sue Morgan for libel and slander, for merely voicing her opinion about Reinhard's mistreatment of the remains of her ancestors. See Exhibit 3. In turn, Morgan was forced to enlist the assistance of the Native American Rights Fund to defend against

Reinhard's ultimately hollow, yet intimidating threat of suit. See Exhibit 4. Reinhard quickly backed off, but the situation between the tribes and the University appears to remain unresolved at this time.

This is merely one example of controversies triggered by "further scientific studies" when cultural affiliation of human remains is known. Congress can and should prevent these unfortunate, costly and ultimately unnecessary conflicts by amending NAGPRA to expressly prohibit further studies of human remains and funerary objects when cultural affiliation is known, absent express written consent of the governing bodies of affected tribes, individuals or entities.

NARF, the Pawnee Tribe of Oklahoma and Judi Morgan are deeply appreciative of the Committee's continuing concern and interest to assure that NAGPRA is properly and fully implemented.

Lawsuit

Continued from Page 1

express the deviation of the ratio of carbon-13 to carbon-12 and can be used to determine diet.

In order to determine delta carbon values, about one gram of bone material must be used in experimentation, according to Minge Suiver, a professor of geological sciences at the University of Washington in Seattle.

Reinhard was at a conference in Cartagena, Colombia, and could not be reached for comment.

Reinhard met with Reinhard and members of UNL's NAGPRA committee last June. Committee members told him about 75 to 80 remains were identified as Ponca, he said.

Reinhard was "quite" interested in research, Hinman said.

"I told them I was not interested in research," Hinman said. "I was interested in reburying the remains."

Permission for research can be granted only through a tribal resolution, Hinman said, and neither Reinhard nor the Ponca tribe was one from the Oklahoma tribe.

Priscilla Grew, vice chancellor for research and a member of UNL's NAGPRA committee, said she was not aware of the pending lawsuit.

She said the university issued a moratorium — a legal authorization to stop or delay — on research. Research may have been done before the moratorium, she said.

Grew said identification was the only work being done on Ponca remains. Under NAGPRA, the university must complete a complete inventory of remains by Nov. 16, 1995.

Dan, 2/22/95-22
1/22/13, 1995

UNL faces lawsuit from Ponca tribe

By Paula Lavigne

Senior Reporter

"We've been patient, but our patience has come to an end. We have grounds for a lawsuit against UNL for a substantial sum of money. This is sacrifice."

MAYNARD HINMAN

Tribal planner for the Ponca Tribe of Oklahoma.

The Ponca Tribe of Oklahoma will file a lawsuit against the University of Nebraska-Lincoln for performing destructive research analysis on Ponca ancestral remains, a tribal leader said.

Maynard Hinman, tribal planner, said a lawsuit would be filed by the end of February after the Ponca tribe consulted with the Ponca Tribe of Nebraska.

He said the research by Karl Reinhard, a UNL assistant professor of anthropology, may have violated Nebraska state laws, the federal Native American Graves Protection and Repatriation Act and civil rights laws.

"We've been patient, but our patience has come to an end," he said.

"We have grounds for a lawsuit against UNL for a substantial sum of money. This is sacrifice," Hinman said. Reinhard's research results showed evidence of destructive analysis. In the 1994 publication

"In the Wake of Contact: Biological Responses to Conquest," Reinhard cites delta carbon values, figures that

See LAWSUIT on 6

Fred Le Roy, chairman of the Ponca Tribe of Nebraska, said he also had never given permission to Reinhard to conduct research.

Le Roy said he would have to confer with the Ponca Tribe of Oklahoma, but said he wanted to find a solution without legal action.

The Ponca tribe, Hinman said, was known for its legal pursuits. He said he would add to the lawsuit a claim of illegal possession of property.

"When we met with them, we said, 'How do you 'legally' establish the property belongs to the University of Nebraska-Lincoln?'" Hinman said.

"This property could legally be established to the Ponca tribe. They were illegally in possession of property that did not belong to them."

"Under federal law, Native American tribes are sovereign. Hinman said the case would be similar if the university stole burial remains from France, Canada or England.

"We're accusing them of grave robbery," he said. "We told them a great deal."

The Ponca Tribe of Oklahoma was not the only tribe that responded to Reinhard's research.

Roger Echo-Hawk, the tribal historian of the Pawnee Tribe of Oklahoma, has worked as a consultant with archaeologists at UNL.

Echo-Hawk drafted a letter on May

4, 1994, signed by Pawnee Vice President Tom E. Knife Chief, that addressed Reinhard's research.

The letter requested an apology

from Reinhard and three of his graduate assistants for conducting "destructive or invasive skeletal analysis of any kind" on ancestral remains.

EXHIBIT

EXHIBIT

Poncas protest destructive bone tests

BY JOE DUGGAN

Lincoln Journal Star

Potentially unlawful studies of American Indian skeletal remains have left members of the Ponca Tribe of Nebraska feeling victimized by university researchers and administrators.

Two weeks ago the Ponca Tribe reburied bones and artifacts that had been uncovered by archaeologists in 1989. In the process of obtaining the remains from the University of Nebraska-Lincoln, members of the tribe learned that destructive tests had been done on some of the remains without the tribe's written permission.

"We're tired of being looked at," said Jud Morgan, a member of the Ponca Tribe. "This kind of testing dehumanizes us. It's disrespectful."

Anthropology Professor Kari Reinhard oversaw the testing as part of a service project for the university that started in 1989. Reinhard wrote a memo earlier this year to Ray Hames, chairman of the Department of Anthropology in which Reinhard indicated concerns about potential litigation resulting from destructive analyses.

The memo, which was based on a university lawyer's interpretation of the federal Native American Graves Protection and Repatriation Act which passed in late 1990.

The lawyer's opinion stated that "everything that had been done after 1990 was clearly illegal," according to Reinhard. No one asked for a legal opinion about the testing until

MORGAN
tribe memberREINHARD
oversaw testing.

More on PONCAS, Page 10A

10A Lincoln Journal Star
Sunday, November 19, 1995

2

FROM I

Poncas/Tests mix acid with bones to get information

Continued from Page 1A

four years after the federal law was passed.

"What appalled the hell out of me was I was all through this period I had been assured that we were working 'within the limits of NAGPRA,'" Reinhard said. "Proud ignorance by the interpretation of the essential law put me in jeopardy. I was absolutely floored."

University General Counsel John Wiltsie said the opinion was confidential and he refused to discuss it. He confirmed, however, that he had not been consulted about destructive testing of remains until earlier this year.

The university started a moratorium on destructive testing in the summer of 1993. Wiltsie said, to his knowledge, no destructive tests have been conducted since then. That leaves a 2½-year gap during which destructive analyses were done.

The tests involve dissolving acid with a small amount of bone in order to obtain collagen. The collagen is put in an isotope ratio mass spectrometer, which separates stable forms of carbon and nitrogen. From this information, scientists can learn details about disease and dietary habits of the individual.

Reinhard initially used information obtained by tests done on Omaha Indian remains in 1989. Omaha tribal leaders gave their blessings to the research.

Reinhard's findings provided cultural information about the tribe's ancestors. In addition, dietary data helped establish a link between high-fat diets and the high incidence of diabetes among tribal members. Both the Omahas and UNL administrators praised the cooperative effort, saying it proved that scientific study of ancient bone could benefit both science and descendants.

Reinhard's pilot study included destructive tests of Ponca remains. The Poncas of Nebraska, which dissolved in 1989, was restored in late 1990. Reinhard said he ordered the tests before the tribe's restoration in 1990 and before the passage of the federal repatriation law.

The law — passed in late 1990 — requires tribes and universities to help establish a link between high-fat diets and the high incidence of diabetes among tribal members. Both the Omahas and UNL administrators praised the cooperative effort, saying it proved that scientific study of ancient bone could benefit both science and descendants.

Reinhard's pilot study included destructive tests of Ponca remains. The Poncas of Nebraska, which dissolved in 1989, was restored in late 1990. Reinhard said he ordered the tests before the tribe's restoration in 1990 and before the passage of the federal repatriation law.

The law — passed in late 1990 — requires tribes and universities to help establish a link between high-fat diets and the high incidence of diabetes among tribal members. Both the Omahas and UNL administrators praised the cooperative effort, saying it proved that scientific study of ancient bone could benefit both science and descendants.

Reinhard described the grant in a letter sent to the Ponca Tribe in April 1993. In that letter, he clearly pushed for an analysis of Ponca remains that "will follow the pattern of the Omaha tests."

When the bulk of Reinhard's letter, a lawyer for the tribe notified the professor that the Ponca tribal council never authorized the study detailed in Reinhard's grant request.

The law stipulated, however, that researchers could not use the invention

versity administrators: William Splinter, the former vice chancellor for research, and Hugh Genoways, the director of the University of Nebraska State Museum. What was said at the meeting is crucial to explaining whether the university acted within the requirements of the law in conducting the tests.

Discussions at the meeting centered on Reinhard's work with the Omahas. At some point, the administrator asked LeRoy if the Poncas had been interested in having similar analyses of remains on their ancestors.

LeRoy, who at the time was director of the tribe's restoration committee, adamantly denied that he granted permission for the testing. "To have given permission would have required a written agreement from the Ponca interim tribal council," he said.

Genoways said he remembered that he not only gave officials permission to carry out the testing but he demanded that "the university do the same for the Poncas that they did for the Omahas."

Splinter said that LeRoy was non-committal.

"I do not recall Fred giving us any specific approval. I don't think that at the time Fred was giving us any approval or disapproval," Splinter said.

Determinations about the legitimacy of testing hinge on whether LeRoy granted oral permission, said Wiltsie, the UNL lawyer.

"If it was done with the consent of the tribe, no, I don't think it was a violation" of federal law, he stated.

Despite an ambiguous response from one member of the tribe, destructive tests were authorized after the Poncas were restored. Reinhard's records show Larry Tieszen, a professor of biology at Augustana College, confirmed that his laboratory conducted such tests for UNL.

"I believe there were Ponca and Omaha (remains) that were involved," Tieszen said.

In 1992, Reinhard applied for a \$258,000 grant from the National Endowment for the Humanities. Reinhard wanted to money to analyze Omaha and Ponca skeletal data to determine the impact of Europeans on the culture and health of the tribes.

Reinhard described the grant in a letter sent to the Ponca Tribe in April 1993. In that letter, he clearly pushed for an analysis of Ponca remains that "will follow the pattern of the Omaha tests."

When the bulk of Reinhard's letter, a lawyer for the tribe notified the professor that the Ponca tribal council never authorized the study detailed in Reinhard's grant request.

The sites correspond on the map

about \$100,000. He now says that the grant study did not require destructive testing. Because of a lack of funds, Reinhard said the grant shored up results of the Omaha study and the Ponca components essentially were dropped.

Splinter and Genoways both reiterated that any testing was done to prove cultural affiliation. Reinhard said he told the men that destructive analysis could prove cultural affiliation, according to Splinter. Genoways who authorized the testing.

"Every memo I had — including from Bill Splinter — plotted the work I was doing," Reinhard said.

Splinter passed the buck back to the professor, saying that the administration was not in the habit of directing research by the faculty.

"I do not recall any tests I conducted being unethical treatment of materials considered sacred by the tribe," according to Jack Trope, a New Jersey lawyer who helped draft NAGPRA. He also questioned the university's justification that testing was done to prove tribal affiliation.

"Clearly that's not the intent of Congress," Trope said. "It really says that's not what this act is about. Cultural affiliation has to be determined based on existing evidence."

In the end, the Poncas got what they wanted: the remains. Despite the controversy over testing, university officials returned the remains in a timely fashion and members of the tribe were happy to complete the repatriation.

Perhaps as many as 1,000 individuals encompassing 750 burials are contained in the state museum's collection. The issue of repatriation will not go away any time soon, said Morgan, who, in addition to being a Ponca, is also director of the Nebraska Commission on Indian Affairs.

Morgan said she has heard the arguments about how the testing used only a small amount of bone and that they were done simply for tribal identification. She turned the argument on the white culture that predominantly conducted the testing.

Historically, anthropology has treated white remains differently than Indian remains. While pioneer skeletons quickly were returned to the earth, American Indian skeletons were placed on a museum shelf. That's discrimination, plain and simple, Morgan said.

"What about Indian remains are treated any differently?" she asked. "You should have a right to know that when your grandmother is buried, she will be left alone, not dug up in 200 years and have her bones destroyed to be put through isotopic tests."

RECEIPT

12219

LAW OFFICES

BAILEY, POLSKY, COPE & KNAPP

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ANTHONY C. COE

November 21, 1995

CERTIFIED - RETURN RECEIPT

Ms. Judy Morgan
 Nebraska Indian Commission
 State Capitol Bldg.
 Lincoln, NE 68509

EXHIBIT

3

RE: Dr. Karl Reinhard v. Judy Morgan

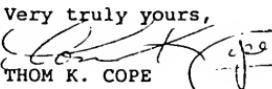
Dear Ms. Morgan:

We represent Dr. Karl Reinhard in possible litigation against you. This letter is written to you pursuant to Neb. Rev. Stat. § 25-840.01. You have made slanderous and libelous statements about Dr. Reinhard. Specifically, you have told tribal leaders that Dr. Reinhard's work was illegal. You have attempted to have tribes sue Dr. Reinhard. You have made statements in speeches denigrating Dr. Reinhard. We have specific evidence that you made statements disparaging Dr. Reinhard at various conferences. At those conferences you discussed Dr. Reinhard's work in an uncomplimentary fashion, and in fact, made statements that his interview in the film "Bones of Contention" were duplicitous. Dr. John Dendy has expressed grave concern about your actions.

Moreover, your activities have made it virtually impossible for Dr. Reinhard to work with Native American Tribes in North America and he may need to take his funding to South America. Under Neb. Rev. Stat. § 25-840.01, you have 21 days in which to set the record straight. We expect letters to be sent to John Dendy (713 S. Buckeye, Abilene, KS., 67410), Steven Holen, Tom Meyer, Fred LeRoy, Joe Dugan, from the Journal-Star, and other Tribal leaders.

Your activities will result in a lawsuit against you unless you immediately cease and desist your disparaging remarks and if you fail to retract the mis-information you have been disseminating. If we don't have copies of your letters within 21 days, I have been authorized to protect Dr. Reinhard's legal rights.

Very truly yours,


 THOM K. COPE

TKC:jlc

cc Karl Reinhard

Native American Rights Fund

Attorneys
 Richard Dauphinais (DC, CO)
 James K. Kawaahara *
 Robert M. Peregoy (DC, CO)
 *admitted in California only

1712 N Street, N.W. • Washington, D.C. 20036-2976 • (202) 785-4166 • Fax (202) 822-0068

Executive Director
 John F. Echohawk
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 1306 Broadway
 Boulder, CO 80302-6246
 (303) 447-8760
 Fax (303) 443-7776

EXHIBIT

BY CERTIFIED MAIL # P004646036
 RETURN RECEIPT REQUESTED

4

December 12, 1995

Thom K. Cope, Esq.
 211 North 12th Street
 Suite 400, Cooper Plaza Bldg.
 Lincoln, NE 68508

Re: Your November 21, 1995 Letter to Ms. Judi Morgan

Dear Mr. Cope:

We represent Judi Morgan in "possible litigation" which Dr. Karl Reinhard has threatened pursuant to your letter to Ms. Morgan dated November 21, 1995 (copy enclosed). Therein, you demand that Ms. Morgan "set the record straight" with regard to unspecified "slanderous and libelous statements about Dr. Reinhard" which he alleges she made. You threaten to sue her on behalf of Dr. Reinhard unless she "immediately ceases and desists" making alleged, unidentified "disparaging remarks," and if she fails to retract alleged, unexplained "mis-information."

As set forth below, there is no truth or substance to the inexplicit allegations alluded to in your letter. Your client therefore has no cause of action against Ms. Morgan. Even if he did, she is immune from suit.

You rely on Neb. Rev. Stat §25-840.01 in what amounts to nothing more than a transparent attempt to threaten, intimidate and coerce Ms. Morgan into renouncing her First Amendment right to free speech. This statute requires a plaintiff in an action for damages for the publication of libel or invasion of privacy to request a correction in order to recover more than special damages. The statute requires the plaintiff to give each defendant a certified or registered notice "specifying the statements claimed to be libelous...and specifically requesting correction." (Emphasis supplied). Publication of a correction is required to be made within three weeks after receipt "in substantially as conspicuous a manner as the original publication about which the complaint was made."

Thom K. Cope, Esq.
December 12, 1995
Page 2

Your November 21, 1995 letter fails in all respects to specify the alleged libelous statements which your client attempts to impute to Ms. Morgan. It does not identify any particular "publication," nor does it refer to any specific content, date, place or surrounding circumstances. It therefore falls far short of the notice requirements of Neb. Rev. Stat. §25-840.01, and does not constitute "notice" thereunder.

Moreover, your letter baldly demands that Ms. Morgan "retract the misinformation [she has] been disseminating," as alleged. This vague demand further fails to meet the statutory requirement to "specifically request correction." It therefore does not constitute a request for correction under Neb. Rev. Stat. §25-840.01.

In short, the November 21 letter fails in all respects to comply with the Nebraska statute upon which you rely to threaten suit against Ms. Morgan. As a result, our client is left in the dark as to what specific actionable statements she allegedly made. Likewise, she is at a loss to understand what specific "corrections" Dr. Reinhard wants or expects her to make.

Any comments Ms. Morgan may have made which may have upset Dr. Reinhard are not false statements of fact; they are simply and solely her subjective opinion of Reinhard's and the University's mistreatment of her ancestors' remains. Subjective opinions are not libelous per se. They constitute free speech and are plainly protected by the First Amendment. *See Turner v. Welliver, et al.*, 226 Neb. 275, 291-93 (1987); *K Corporation v. Stewart*, 247 Neb. 290, 295 (1995). *See also, Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*, 39 F.3d 191, (1994) (statement of opinion actionable only if it reasonably implies false and defamatory facts and "only defamatory facts that are capable of being proved false are subject to liability under state libel law;" terms, such as "unfair," which require a subjective determination are incapable of factual proof, and are therefore not actionable); *Wheeler v. Nebraska State Bar Association*, 244 Neb. 786, 789 (1993) (threshold question in defamation suits is whether a reasonable fact finder could conclude that the published statements imply a provably false assertion of fact).

Even if Ms. Morgan's statements would not qualify as nonactionable pure opinion, the truth of her statements would serve as a defense to any libel claim, should your client somehow succeed in bringing and maintaining a suit against her. However, he cannot do so.

You may be interested to know that officials of Indian tribes enjoy common law immunity from suit when acting in their official

Thom K. Cope, Esq.
December 12, 1995
Page 3

or representative capacity and within the scope of their valid authority. *Id.* See *Burlington Northern R.R. Co. v. Blackfeet Tribe of Indians*, 924 F.2d 899, 902 (9th Cir. 1991), cert. denied 505 U.S. 1212 (1992). Ms. Morgan served as the NAGPRA Specialist (Native American Graves Protection and Repatriation Act) for the Ponca Tribe of Nebraska at all relevant times. During this period, as part of her official duties and responsibilities, she was unequivocally vested with authority to speak about the treatment of the remains of Ponca ancestors. Therefore, she is immune from suit under the doctrine of tribal sovereign immunity in the first instance.

By all accounts, particularly the Lincoln Journal Star article entitled "Poncas protest destructive bone tests," published two days before your November 21 letter to Ms. Morgan, it appears that Dr. Reinhard is running scared, and has sought to shift the focus from possible unlawful conduct on his part (as well as on the part of the University) to Ms. Morgan's constitutionally-protected speech. However, threatening to bring a groundless lawsuit against a former tribal official does nothing to resolve what apparently has become another acrimonious relationship involving a state agency and indigenous Nebraska Indian tribes and their officials. This is particularly so where at least one of the tribes has indicated it is considering suit against the University.

If anything, your client's November 21 bogus demand only serves to exacerbate a tense situation. As counsel for the Pawnee Tribe of Oklahoma against the Nebraska State Historical Society in past repatriation matters, including litigation, I can assure you that spurious tactics such as those employed in your November 21 letter can backfire and cause sensitive matters such as this to explode, to the detriment of all concerned.

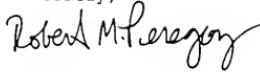
In closing, we expect you, on Dr. Reinhard's behalf, to send a letter to Ms. Morgan retracting the unfounded and false allegations that Ms. Morgan "made slanderous and libelous statements about Dr. Reinhard," as published in your November 21, 1995 letter. We expect copies of this retraction to be sent to John Dendy (713 S. Buckeye, Abilene KS 67410), Steven Holen, Tom Meyer, Joe Dugan of the Lincoln Journal-Star, and Fred LeRoy, chairman of the Ponca Tribe of Nebraska (Lincoln Field Office, 3341 Pioneers Blvd. Ste. 5, Lincoln, NE 68506). This demand for correction and retraction is sent pursuant to Neb. Rev. Stat. § 25-840.01, as set forth above.

If we don't receive a copy of such letter within 21 days, Ms. Morgan will reluctantly consider initiating further action concerning Dr. Reinhard, which could ultimately implicate the University of Nebraska. At a minimum, this includes advising the Ponca Tribes of Nebraska and Oklahoma of his unredressed, hollow

Thom K. Cope, Esq.
December 12, 1995
Page 4

threat of suit and concomitant attempt to intimidate and coerce her into abandoning her constitutionally-protected right of free speech to express her opinion about how Dr. Reinhard (and the University of Nebraska) mistreated the remains of her Ponca ancestors-- mistreatment which a University attorney has already concluded was "clearly illegal" under federal law.

Sincerely,



Robert M. Peregoy

Enc

cc w/enc: Ms. Judi Morgan, Director
Nebraska Indian Commission
The Honorable Fred LeRoy, Chairman
Ponca Tribe of Nebraska
Mr. Chuck Hasserbrook, Member
Board of Regents, University of Nebraska
Dr. Joan Leitzel, Interim Chancellor
University of Nebraska, Lincoln
Dr. James Moeser, Chancellor
University of Nebraska, Lincoln
Dr. Pricella Grew
Vice Chancellor for Research, UNL
Dr. Brian Foster, Dean
College of Letters and Science, UNL
Dr. Ray Hames, Chairman
Anthropology Department, UNL
Dr. Thomas P. Myers
Repatriation Director, UNL
Mr. John Wiltse, Esq.
Associate General Counsel, UNL
Dr. Steve Holen, Research Archaeologist
University of Nebraska, Lincoln
Ms. Melanie J. Whittamore-Mantzios, Esq.
Asst. Attorney General, Nebraska
Mr. Joe Dugan, Lincoln Journal-Star
Mr. John Dendy

STATEMENT OF KATHERINE H. STEVENSON, ASSOCIATE DIRECTOR, CULTURAL RESOURCE STEWARDSHIP AND PARTNERSHIPS, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, REGARDING THE STATUS OF IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT.

December 6, 1995

Mr. Chairman, I appreciate the opportunity to appear before your committee to discuss the status of implementation of the Native American Graves Protection and Repatriation Act (NAGPRA).

NAGPRA was enacted on November 16, 1990, to address the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony with which they are affiliated. The Secretary of the Interior is responsible for implementation of the statute. Principal among the Secretary's responsibilities are:

- o developing regulations implementing the statute;
- o administering a program of grants to assist museums, Indian tribes, and Native Hawaiian organizations in complying with their responsibilities under the statute; and
- o creating a review committee of seven private citizens to advise on regulations and assist in other aspects of implementation of the statute.

In the five years since NAGPRA's enactment, the National Park Service (NPS) has taken a variety of steps on behalf of the Secretary to implement the statute. The NPS has the appropriate governmentwide mandate for working with other Federal agencies on

this issue as the NPS represents the Secretary in matters related to collections management and care of archeological collections and has staff expertise in curation generally. Also, NPS has worked very closely with Indian tribes and Native Hawaiian organizations to preserve and protect cultural resources related to tribes throughout the country.

My predecessor, Jerry Rogers, provided information at this committee's previous oversight hearing on May 27, 1993. I would like to update the committee on activities since that time.

Regulations: On May 28, 1993, proposed regulations implementing the statute were published for public review and comment in the *Federal Register*. Copies of the proposed rule were sent to the chief executive officers of all Indian tribes, Alaska Native villages and corporations, Native Hawaiian organizations, national Indian organizations and advocacy groups, national scientific and museum organizations, and state and Federal agency historic preservation officers and chief archaeologists. Eighty-two written comments were received, representing 89 separate organizations and individuals. These included thirteen Indian tribes, ten Native American organizations, nine museums, seven universities, three national scientific and museum organizations, eleven state agencies, nineteen Federal agencies, nine other organizations, and eight individuals. Several letters

represented more than one organization. Comments addressed nearly all sections and appendices of the proposed rule.

All comments were fully considered when revising the proposed rule in the final rulemaking. A draft of the final rule was evaluated and revised in consultation with the review committee at its September, 1993, meeting in Washington. Further consultation with the review committee occurred at subsequent meetings in Phoenix and Rapid City in February and May, 1994. The draft final rule, with an extensive preamble evaluating all substantive comments, was submitted for Departmental review in September, 1994. The review of these regulations within the Department of the Interior has been extensive and intensive. The Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, Office of Surface Mining, as well as several sections of the Office of the Solicitor and the Assistant Secretaries for Indian Affairs, Land and Minerals Management, and Water and Science took part in these discussions. The regulations were approved by Assistant Secretary for Fish and Wildlife and Parks, George T. Frampton, Jr., on September 20, 1995, and the final rule was published in the *Federal Register* on December 4, 1995.

Grants: Funds to institute the grants program were first requested and appropriated in FY 1994. The program was continued in FY 1995 and is included in the Conference Report in the

FY 1996 budget. Since its inception, 83 NAGPRA grant awards totalling \$4.37 million have been awarded by the Secretary. Three hundred and thirty-seven proposals were submitted over the past two years, with a total request of nearly \$30 million. Section 10 of the statute authorizes the Secretary to make grants to museums to assist them in conducting inventories and identification required under the Act, and to Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations to assist in the repatriation of human remains and cultural items. Grants have been provided for educational workshops, compiling inventories, reviewing documentation, and coordinating tribal-museum discussions on cultural affiliation.

Review Committee: The Native American Graves Protection and Repatriation Review Committee, initially established in April, 1992, has met eleven times. The committee was established to monitor implementation, consult with the Secretary, advise Congress, and facilitate the resolution of disputes. The committee has been deeply involved in development of the regulations as I have already indicated. The committee also has spent considerable time in facilitating resolution of five disputes: two have been resolved, recommendations have been made on a third, and two are under active consideration. The review committee has provided two reports to the Senate Committee on Indian Affairs and its counterpart in the House, discussing more fully its activities and making several specific recommendations.

Eight hundred and forty-seven museums and Federal agencies have provided summaries of their collections to Indian tribes and Native Hawaiian organizations. Several inventories are almost complete, although a number of museums have applied for extensions. While major progress has been made by Federal agencies and museums, efforts are ongoing and completion is anticipated in the near future, subject to available funds.

Sixty-six statutorily required *Federal Register* notices have announced museum and Federal agency willingness to repatriate 2,713 human remains, 122,948 funerary objects, 212 sacred objects, and 16 objects of cultural patrimony. Federal agencies are actively involved in consultation and determinations of custody related to excavations and inadvertent discoveries on Federal and tribal land. Museums and Federal agencies have shared information about their collections with culturally affiliated Indian tribes and Native Hawaiian organizations. Grant support has been provided to some Indian tribes, Native Hawaiian organizations, and museums. The review committee is actively involved in monitoring implementation, consulting with the Secretary, advising Congress, and facilitating the resolution of disputes.

Future Actions: The next phase of implementation will in many ways be more difficult than the first. With documentation in hand, Indian tribes and Native Hawaiian organizations are now

beginning the protracted and potentially contentious consultation process to verify their rights to particular Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. The support of this Committee is needed to guarantee the dialogue continues. I would like to take this opportunity to bring to your attention four specific areas of concern:

- 1) The grant program initiated in FY 1994 is needed now more than ever to facilitate reviewing documentation, establishing cultural affiliation, promoting ongoing dialogue between Indian tribes, Native Hawaiian organizations, Federal agencies and museums;
- 2) The continued appropriations for NAGPRA implementation within the budgets of Federal agencies, particularly the land management agencies with the largest collections and lands to manage; i.e., NPS, BLM, FWS, BOR, and the Corps of Engineers, are essential if the agencies are to meet their statutory requirements;
- 3) Publication of *Federal Register* notices on time may be difficult given available resources. This could delay repatriations;

- 4) The number of disputes is expected to increase, making it more difficult to resolve conflicts between museums, Indian tribes, and Native Hawaiian organizations; and
- 5) Impending publication of civil penalty regulations, needed to ensure compliance with the statute, will require additional effort to meet new enforcement responsibilities.

Mr. Chairman, we have worked to implement this important statute as expeditiously as possible. We will strive to do our utmost to fulfill our obligations under current budgetary constraints.

This concludes my prepared remarks, Mr. Chairman. I will be pleased to answer any questions you may have.



IN REPLY REFER TO

United States Department of the Interior



NATIONAL PARK SERVICE
P.O. Box 37127
Washington, D.C. 20013-7127

W3823(2275)

MAR 21 1996

Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Senator McCain:

I apologize for the lateness of this reply to your request for additional information from the National Park Service and the Department of the Interior regarding implementation of the Native American Graves Protection and Repatriation Act. We did not receive your December 15, 1995, request until mid-January due to the extended shut-down of the National Park Service. Many of your questions have several parts. In organizing this response, we have divided some questions into subsections labelled by letters, e.g. (a), (b), (c), etc.. We hope this will keep our reply clear.

1. (a) Could you describe what criteria the Department is considering in order to grant the time extensions? (b) How long does the Department anticipate it will take to complete all inventories and facilitate the repatriation process? (c) Has there been any consultation with Indian tribes in the development of extension criteria?
 - (a) Section 5 (c) of the Act stipulates that "the Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process." Museums appealing to the Secretary for an extension to the November 16, 1995, deadline for inventory completion were required to submit:
 - i. A letter from the museum's governing body describing the reasons for the institution's expected failure to meet the November 16, 1995 deadline;
 - ii. A description, organized by archeological site and/or geographic source, of Native American human remains and associated funerary objects in the museum's collection, including those on loan, which estimates the minimum number of individuals and the minimum number of associated funerary objects and identifies the current location of each;
 - iii. A listing of the name, title, and phone number of all Indian tribe, Alaska Native village and corporation, and Native Hawaiian organization officials and traditional religious leaders who have been consulted regarding the cultural affiliation of the human remains and associated funerary objects (contacts may be confirmed prior to issuance of any extension); and

- iv. A written plan to complete the inventory by a specific date, including identification of the steps necessary to complete the inventory; position titles of the persons responsible for completion of each step; a schedule for implementing provisions of the written plan; and a description of efforts, in addition to submission of this application, to obtain the requisite funding.
- (b) As of February 6, 1996, 469 inventories had been received from museums and Federal agencies. Additional completed inventories are expected before the May 16, 1996, deadline for notification. Eighty museums have appealed for more time to complete their inventories. These appeals are under review at this time. The maximum extension being considered at this time is three years. All other inventories should have been completed by November 16, 1995. However, the repatriation process can be expected to extend indefinitely as Indian tribes and Native Hawaiian organizations continue to review the summaries and inventories and prepare claims. There is no statute of limitations for tribal claims.
- (c) Extension criteria were discussed at Review Committee meetings -- all of which are open, public meetings -- by members of the committee. Members of the public, including tribal representatives, attended the meetings regularly and expressed their concerns on a variety of matters, including these issues. The criteria require the museum to provide evidence of consultation with culturally affiliated Indian tribes before an extension appeal will be considered.

2. (a) How is the Department preparing for the backlog of inventories? (b) What time limit will the Department establish for the completion of inventories?

- (a) The National Park Service NAGPRA staff is currently evaluating each inventory for completeness, preparing all notices of inventory completion for publication in the *Federal Register*, and preparing a list of all culturally unidentifiable human remains to provide to the Review Committee. At current staff levels this process is anticipated to take two to three years. More rapid processing of inventories would require additional resources.
- (b) All inventories should have been completed by November 16, 1995. Eighty museums have appealed for extensions to this deadline. The Department is currently evaluating these appeals based upon evidence of the museum's good faith efforts to date and substantial numbers of human remains and funerary objects subject to the statute that they hold. At this time, the Department is considering a three year maximum extension of the inventory deadline. Fourteen of the largest natural history museums have appealed for more than a one year extension to complete their inventories.

3. When do you anticipate that the proposed regulations to implement the civil penalty provisions under section 10 of the Act will be published?

Draft regulations establishing due process procedures to implement section 9 of the Act have been developed in consultation with the Review Committee and, following formal review within the Department and the Office of Management and Budget, will

soon be ready for publication in the *Federal Register*. The Department is considering publishing these procedures as an interim rule that would go into effect while public comment is being considered in order to circumvent the possibility of being unable to assess a penalty due to expiration of the statute of limitations. The draft of this section has been pre-reviewed by all relevant offices within the Department in order to expedite the formal review process once the decision to proceed has been made. We hope to begin the formal review process soon and have the regulations published as an interim rule in the near future.

4. (a) How will the Department of the Interior work with Indian tribes to determine the disposition and treatment of unidentifiable human remains? (b) Are you aware of any proposals regarding disposition of culturally unidentifiable human remains currently under consideration?
 - (a) Section 8 (c)(5) of the Act requires the seven person Native American Graves Protection and Repatriation Review Committee to recommend specific actions for developing a process for the disposition of culturally unidentifiable Native American human remains. In the spring of 1995, the Review Committee distributed a draft of its recommendations for public comment to all Indian tribes and Native Hawaiian organizations, as well as museums, Federal agencies, and national scientific and museum organizations. The Review Committee is currently considering the 120 written comments it received and has indicated its desire to circulate a revised draft in 1996.
 - (b) The Review Committee's draft recommendations, which are currently being redrafted for further review, is the only document being considered at present.
5. (a) Could you provide an estimate on the approximate number of inventories that have been received by the Department? (b) Could you provide an estimate on the number of time extensions requests received from museums and Federal agencies? (c) Will the Department notify Indian tribes of the extensions granted to specific museums or Federal agencies?
 - (a) As of February 1, 1996, we have received 469 inventories from museums and Federal agencies. Additional inventories are expected by the May 16, 1996, notification deadline.
 - (b) Eighty appeals for extensions to the November 16, 1995, deadline for inventory completion have been received from museums. The statute does not provide for extensions for Federal agencies.
 - (c) A list of all extensions is being published in the *Federal Register* and next issue of *Common Ground* (formerly *Federal Archeology*), the National Park Service's quarterly publication on Federal archeology and ethnography. This publication is received by all Indian tribes and Native Hawaiian organizations, as well as by individual Native Americans. The publication is also received by museums, Federal agencies, and national scientific and museum organizations.

6. Does the Park Service or the Review Committee have a process to monitor museums conducting excessive, expensive, and time consuming studies under the guise of "documenting" or "inventorying"?

Complaints regarding museum and Federal agency compliance with provisions of the statute can be directed to the Secretary or the Review Committee. We have no separate procedures for monitoring museum compliance.

7. Did the Park Service engage in any consultation with Indian tribes, tribal or museum organizations over promulgation of the regulations beyond publishing the draft regulations in the Federal Register and consultation with the Review Committee?

Three drafts of what eventually was published as the proposed regulations were distributed to Indian tribes, museums, Federal agencies, and national scientific and museum organizations. Comments on these drafts were considered in preparing the proposed regulations.

8. What level of priority has the Park Service placed on requesting funds for grants?

The National Park Service has placed a high priority on maintaining the grants program in the face of necessary budget reductions.

The following questions were submitted on behalf of the Committee's Vice Chairman, Senator Inouye. To distinguish them from the preceding questions, we have labeled them using the Senator's name as a prefix, e.g. "Inouye 1," Inouye 2," etc.

Inouye 1. Could you please provide the Committee with a list of grantees for FY 1994 and FY 1995?

A list of all grantees is enclosed.

Inouye 2. (a) Couldn't section 10.10 (b)(2) of the regulations delay repatriation or limit the authority of a museum or Federal agency to repatriate? (b) What would happen if a museum simply fails to comply with the inventory requirement? (c) Is repatriation prohibited if a museum fails to complete its inventory? (d) What is the longest extension for inventory completion that will be given? (e) Will multiple extensions be permitted?

(a) The thirty day waiting period following publication of the notice of inventory completion in the *Federal Register* is intended to satisfy due process considerations by alerting any possible additional claimant of the impending repatriation. This requirement has been waived for two repatriations that were pending on November 16, 1990, consistent with section 11 (2) of the Act.

(b) Inventories are intended to provide all lineal descendants, Indian tribes, and Native Hawaiian organizations with the information needed to claim human remains and associated funerary objects. Any museum that does not complete the inventory of human remains and associated funerary objects in its collection has failed to comply

with provisions of the Act and could be liable for civil penalties under section 9 of the Act.

- (c) The only exemption to completing an inventory prior to repatriation would be if the repatriation was pending on November 16, 1990 consistent with section 11 (2) of the Act.
- (d) Three years.
- (e) Multiple extensions are not anticipated at this time.

Inouye 2. [number repeated in original] (a) Why is notice of the entire inventory completion needed to satisfy due process? (b) Wouldn't due process be satisfied by the notice requirement pertaining to specific repatriations or even by a letter from the museum or Federal agency to potential competing claimants?

- (a) The National Park Service has encouraged museums and Federal agencies to expedite completion of inventories for portions of their collections which have elicited the interest of Indian tribes and Native Hawaiian organizations. Completion of an entire inventory is not required in order to proceed with a notice of inventory completion or a notice of intent to repatriate. All of the 65 notices thus far published in the *Federal Register* are for portions of museum or Federal agency collections.
- (b) All of the 65 notices that have thus far been published in the *Federal Register* relate to specific repatriations and not to a museum or Federal agency's entire collection. Notification by letter might satisfy due process considerations but is not what the Act requires.

Inouye 3. (a) What happens if a tribe that clearly has a claim with regard to remains or objects discovered on Federal land states that it does not want any studies or analyses of the remains and the Federal agency disagrees? (b) Are invasive activities permitted over the objection of a tribe with the clear right to custody of the items?

- (a) Federal agencies are precluded from any activity in the vicinity of inadvertently discovered human remains or cultural items, beyond protecting the items discovered, for a period of thirty days while consultation with affiliated Indian tribes or Native Hawaiian organizations proceed. The Federal agency is responsible for determining necessary investigations and recording if human remains or cultural items must be removed. Any such excavation must be conducted following the requirements of the Archaeological Resources Protection Act (ARPA) as stated in section 3 (c) of the statute. Meeting the requirements of ARPA involves appropriate description and analysis of any excavated human remains and cultural items. We have encouraged Federal agencies to develop in consultation with affiliated Indian tribes mutually acceptable methods for recording and analysis. However, the Federal agencies have the responsibility for determining appropriate recording measures within the requirements of ARPA.

(b) No studies may be conducted that delay repatriation, unless the study has been determined to be of major benefit to the United States. The Federal agency or museum is responsible for determining necessary investigations and recording.

Inouye 4. Are there any limitations on the treatment of human remains and cultural items during the period before an Indian tribe or Native Hawaiian organization can actually assume custody of unearthed materials?

The statute cannot be used to authorize additional scientific studies. However, the statute does not restrict such treatment as long as repatriation is not delayed.

Inouye 5. What happens to remains and/or cultural items if one tribe clearly has a claim based upon the site being located on its aboriginal land, but it is not known whether another tribe may have a claim based upon affiliation?

For new excavations or inadvertent discoveries, Federal agency officials are required to consult with any lineal descendant, tribal land owner, culturally affiliated Indian tribe or Native Hawaiian organization, Indian tribe that aboriginally occupied the site area, and Indian tribe with some "other cultural relationship" prior to determining the disposition of discovered or excavated human remains or cultural items. The Federal agency is required to repatriate upon the request of an Indian tribe from whose aboriginal lands the human remains or cultural items came if no lineal descendant, tribal land owner, or culturally affiliated Indian tribe or Native Hawaiian organization is identified.

Inouye 6. (a) What is the meaning given to "sufficient legal interest?" (b) Could a museum possess and display items on a long-term basis, yet be said not to possess the items for purposes of NAGPRA?

(a) "Sufficient legal interest" means adequate authority to exercise restraining or directing control over something.

(b) Yes, museums do not generally have sufficient legal interest in items on loan from private individuals for the statute to apply.

Inouye 7. Will the list of Indian tribes covered by the Act include all tribes that receive services from any Federal agency, or will it be limited to tribes that are recognized by the Department of the Interior?

The definition of Indian tribe used in the statute was explicitly drawn from the Indian Self Determination Act. The list of Indian tribes with standing to make claims under NAGPRA includes Indian tribes listed in the Bureau of Indian Affairs list in the *Federal Register*, plus Alaska Native village and regional corporations eligible for self determination contracts.

Inouye 8. Do you have any recommendations or suggestions to address your concerns regarding the ongoing implementation of the Act?

The continuing implementation of the statute remains challenging. With inventory documentation in hand, Indian tribes and Native Hawaiian organizations are beginning the consultation process to verify their rights to particular human remains, funerary objects, sacred objects, and objects of cultural patrimony. We have identified four specific areas of concern:

- a. Publication of *Federal Register* notices to fulfill Constitutional, statutory, and regulatory due process requirements may delay repatriations. The Secretary is required to publish notices in the *Federal Register* prior to a museum or Federal agency repatriating human remains, funerary objects, sacred objects, or objects of cultural patrimony to culturally affiliated Indian tribes or Native Hawaiian organizations. The publication cost of one notice averages \$264. Sixty-five notices have been published since 1992. As noted above, nearly 500 inventories have been submitted at present. If each inventory requires only one *Federal Register* notice, and it is our experience that large inventories may require several, the cost of *Federal Register* notice publication this year will be over \$100,000.
- b. The number of disputes is expected to increase, further complicating our ability to schedule review committee meetings and thus prolonging conflicts between museums, Indian tribes, and Native Hawaiian organizations. The review committee has thus far considered four disputes. The number of disputes is expected to rise now that most museums and Federal agencies have provided Indian tribes with information about their collections.
- c. Impending publication of civil penalty regulations, needed to ensure compliance with the statute, will result in new enforcement responsibilities. Section 9 of the statute authorized the Secretary to assess civil penalties against any museum that fails to comply with the Act. Regulations, required to ensure due process, have been developed in consultation with the review committee. The Department is considering issuing these procedures as an interim rule that would take effect immediately to guard against museums avoiding an assessment because the statute of limitations expired. The Office of the Solicitor has estimated that one civil penalty case -- from initial investigation to final appeal -- could cost the Department \$100,000 in staff time and resources.
- d. The grant program initiated in FY 1994 is needed to facilitate ongoing dialogue between Indian tribes, Native Hawaiian organizations, and museums. The Congressional Budget Office estimated in 1990 that implementation of the Act would cost \$50 million over five years. Since its inception, 83 NAGPRA grant awards totalling \$4.37 million have been awarded by the Secretary. Three hundred and thirty-seven proposals were submitted over the past two years with a total request of nearly \$30 million.
- e. Two technical amendments to the statute should be considered:
 1. Amend section 8 (c)(5) to make the review committee responsible for "compiling an inventory of culturally unidentifiable human remains and associated funerary objects that are in the possession or control of each Federal

agency and museum and recommending specific actions for developing a process for *their* disposition.

2. Amend section 9 as follows:

(e) Enforcement. Penalties collected under this section will supplement the appropriation bearing the cost of related enforcement activities. The Secretary may:

(1) pay to any person who furnishes information which leads to the finding of a civil penalty (except officers or employees of the United States or any State or local government who furnishes information or renders service in the performance of official duties) an amount not to exceed one half of such penalty or \$1000, whichever is less; and

(2) reduce a penalty if the violator agrees to pay appropriate restitution to the aggrieved party or parties or may pay to aggrieved parties as restitution an amount not to exceed the amount of the penalty.

The following questions deal specifically with implications of *Na Iwi v. Dalton et al.* To distinguish them from the preceding questions, we have labeled them using the site location as a prefix, e.g. "Mokapu 1," Mokapu 2," etc.

Mokapu 1. (a) Should information derived from the NAGPRA inventory process be subject to public disclosure? (b) Should Congress amend NAGPRA to provide protection from public disclosure of information derived from NAGPRA inventories? (c) Should protection of information from NAGPRA inventories from public disclosure be limited in scope? (d) Should NAGPRA inventory information be exempted from the application of the Freedom of Information Act?

(a) An inventory is an item-by-item description of Native American human remains and associated funerary objects compiled by museums and Federal agencies to determine the cultural affiliation of those items and document that museums and Federal agencies have adequately exercised their responsibilities in complying with the law. These documents serve as records of the human remains and associated funerary objects currently under the control of Federal agencies and museums and of the human remains and associated funerary objects repatriated to Indian tribes and Native Hawaiian organizations. Public access to such information is vital to monitor the progress on repatriation and subsequent treatment of repatriated human remains and cultural items.

(b) No.

(c) If Congress wishes to consider this further, any restrictions on public disclosure should be limited.

(d) The purpose of the Freedom of Information Act is to guarantee an informed citizenry so vital to the functioning of a democratic society. The Supreme Court has

emphasized that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." Amending the Freedom of Information Act to exempt inventory information would largely preclude public oversight of Federal agencies' compliance with the NAGPRA, while having no effect on information compiled by non-Federal museums. We do not recommend NAGPRA inventory information be exempted from the Freedom of Information Act.

Mokapu 2. (a) Does NAGPRA sufficiently address the issue of necessary scientific studies which may be initiated during the course of compiling an inventory? (b) Do you believe that definitions of "inventory," "scientific study," or "scientific information" may be warranted? (c) Under what circumstances would further scientific studies be warranted?

(a) Yes.

(b) The statutory definition of "inventory," which is repeated in the final regulations, is sufficient. The term "scientific study" is used only in section 7 (b) of the statute and 43 CFR 10.10 (c)(1) which provides an exemption to expedient repatriation in circumstances where human remains and cultural items are indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States. The exact nature of "scientific" study seems less important in this definition than what constitutes a "major benefit to the United States." Thus far, no museum or Federal agency has declined to repatriate on these groups. The term "scientific information" is used in neither the statute nor the regulations. A definition is not needed.

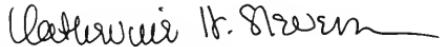
(c) When they are identified to be of major benefit to the United States.

Mokapu 3. Should Congress amend the Act to provide authority for legal actions to be brought by who may qualify to serve as guardians?

The statute established a new and complex set of relationships between museums, Federal agencies, and Indian tribes and Native Hawaiian organizations. Amending the statute to add a new category of "guardians" will unnecessarily complicate and delay the repatriation process.

We welcome your continued interest in implementation of this important statute. Please contact me if you have any additional questions.

Sincerely,



Katherine H. Stevenson
Associate Director, Cultural Resource
Stewardship and Partnerships

Enclosure

NEWS RELEASE

u.s.department of the interior

national park service

For Immediate Release

Anita Clevenger 202/208-6843
C. Timothy McKeown 202/343-4101**\$2,140,000 AWARDED IN NAGPRA GRANTS**

Secretary of the Interior Bruce Babbitt today announced awards totalling \$2,140,000 for 41 projects to be conducted by museums, Indian tribes, and Alaska Native villages and corporations to assist in implementation of the Native American Graves Protection and Repatriation Act (NAGPRA).

Secretary Babbitt praised the 41 projects as "exemplifying the type of partnership between museums and Indian tribes that is mandated by the Act." Secretary Babbitt said funds have been included in the administration's budget request to continue awarding NAGPRA grants in Fiscal Year 1995.

NAGPRA, enacted in 1990, requires museums and Federal agencies to inventory and identify Native American human remains and cultural items in their collections and to consult with culturally affiliated Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations regarding repatriation by November 16, 1995. Section 10 of the Act authorizes the Secretary of the Interior to award grants to assist museums, Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations to implement provisions of the Act.

The National Park Service (NPS) received 220 applications from 104 Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations, and 109 museums for requests totaling more than \$23 million. Proposals were reviewed by NPS staff and a panel of Native Americans and museum professionals. Grant recipients are undertaking a broad range of projects to implement NAGPRA, including conducting workshops and training, coordinating inter-tribal and inter-museum discussions, and hiring repatriation coordinators to prepare and review documentation.

Specific awards and contacts are listed on the reverse side of this page. Additional information regarding these awards can be obtained from Dr. C. Timothy McKeown, NAGPRA Program Leader, Archeological Assistance Division, National Park Service, P.O. Box 37127, Washington DC.

(over)

P.O. Box 37127

Washington, DC 20013-7127

4

FISCAL YEAR 1994 GRANTS TO ASSIST IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA)

LIST OF AWARDS AND CONTACTS

| | |
|--|----------|
| Alaska State Museums, Juneau AK [Bruce Kato: (907) 465-2901] | \$29,700 |
| Arkansas Archeological Survey, Fayetteville AR [Thomas J. Green: (501) 575-3556] | \$74,500 |
| Bering Straits Foundation, Nome AK [Vernon Olson: (907) 443-5252] | \$73,400 |
| Burke Memorial Museum, Seattle WA [James D. Nason: (206) 543-9680] | \$74,700 |
| Caddo Indian Tribe of Oklahoma, Binger OK [Elmo Clark: (405) 656-2344] | \$75,000 |
| Campo Band of Mission Indians, Campo CA [Ralph Goff: (619) 478-9046] | \$67,800 |
| Catalina Island Museum Society, Avalon CA [Patricia Anne Moore: (310) 510-2414] | \$13,900 |
| Central Council of Tlingit and Haida Indian Tribes of Alaska, Juneau AK [Cheryl Eldemar: (907) 463-7186] | \$75,000 |
| Cheney Cowles Museum, Spokane WA [Lynn Pankonin: (509) 456-3932] | \$57,600 |
| Cheyenne River Sioux Tribe, Eagle Butte SD [James D. Picotte: (605) 964-2543] | \$73,200 |
| Children's Museum, Boston MA [Joan Lester: (617) 426-6500 x261] | \$10,300 |
| Cincinnati Museum of Art, Cincinnati OH [Bill Mercer: (513) 721-5204] | \$15,100 |
| Columbus Museum, Columbus GA [Frank T. Schnell: (706) 649-0713] | \$46,300 |
| Dartmouth College, Hanover NH [Kellen Haak: (603) 646-3109] | \$10,400 |
| Denver Art Museum, Denver CO [Nancy Blomberg: (303) 839-4806] | \$62,500 |
| Hualapai Tribe, Peach Springs AZ [Loretta Jackson: (602) 769-2254] | \$70,900 |
| Jicarilla Apache Tribe, Dulce NM [Calvin Veneno: (505) 759-3242] | \$75,000 |
| Keepers of the Treasure-Alaska, Anchorage AK [Jana Harcharek: (907) 852-0320] | \$37,000 |
| Kenaitze Indian Tribe, I.R.A., Kenai AK [Rita Smagge: (907) 283-3633] | \$75,000 |
| Leech Lake Band of Chippewa, Cass Lake MN [Rose Kluth: (218) 335-8095] | \$57,600 |
| Los Angeles County Museum of Natural History, Los Angeles CA [Margaret Hardin: (213) 744-3381] | \$38,000 |
| Maine State Museum, Augusta ME [John R. Phillips: (207) 287-2301] | \$71,700 |
| Menominee Indian Tribe of Wisconsin, Keshena WI [Betty Jo Wozniak: (715) 799-5154] | \$54,800 |
| Mississippi State University, MS | |

| | |
|--|--------------------|
| [John W. O'Hear: (601) 325-3826] | \$42,000 |
| Museum of New Mexico Foundation, Santa Fe NM | \$74,900 |
| [Bruce Bernstein: (505) 827-6344] | |
| Museum of Texas Tech University, Lubbock TX | |
| [Mei Wan Campbell: (806) 742-2442] | \$20,900 |
| New York State Museum, Albany NY | |
| [Lynne P. Sullivan: (518) 474-5813] | \$82,300 |
| Oklahoma Museum of Natural History, Norman OK | |
| [Julie A. Droke: (405) 325-4712] | \$75,000 |
| Panhandle-Plains Historical Museum, Canyon TX | |
| [Karen Anderson: (806) 656-2234] | \$49,700 |
| Peabody Museum of Archaeology and Ethnology, Cambridge MA | |
| [Barbara Isaac: (617) 495-2254] | \$46,000 |
| Peabody Museum of Archaeology, Andover MA | |
| [James W. Bradley: (508) 749-4490] | \$116,900 |
| Skokomish Indian Tribe, Shelton WA | |
| [Edward H. Binder: (206) 426-4232] | \$48,800 |
| Southern Ute Indian Tribe, Ignacio CO | |
| [Helen Hoskins: (303) 563-9583] | \$35,400 |
| Tuolumne Band of Me-Wuk, Tuolumne CA | |
| [Reba Fuller: (209) -928-3475] | \$73,200 |
| University of Alaska Museum, Fairbanks AK | |
| [Aldona Jonaitis: (907) 474-7505] | \$29,400 |
| University of Oregon Museum of Natural History, Eugene OR | |
| [Don Dumond: (503) 346-5101] | \$75,000 |
| Washoe Tribe of Nevada and California, Gardnerville NV [Jody Steele: (702) 265-4191] | \$56,100 |
| Zuni Pueblo, Zuni NM | |
| [Roger Anyon: (505) 782-5558] | \$75,000 |
| TOTAL | \$2,140,000 |

July 14, 1994

NEWS RELEASE

u.s.department of the interior

national park service

For Release: July 18, 1995

David Barna 202/208-6843
Anita Clevenger 202/208-7394

INTERIOR SECRETARY AWARDS \$2.2 MILLION IN NAGPRA GRANTS

Secretary of the Interior Bruce Babbitt today announced awards totaling \$2,233,200 to assist museums, Indian tribes, Native Hawaiian organizations, and Alaska Native villages and corporations with implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). The awards were divided among 42 projects. —

NAGPRA, enacted in 1990, requires museums and federal agencies to inventory and identify Native American human remains and cultural items in their collections and to consult with culturally affiliated Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations regarding repatriation by November 16, 1995.

The National Park Service (NPS) received 117 applications from 60 Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations, and 52 museums for requests totaling more than \$6.2 million. Proposals were reviewed by NPS staff and a panel of Native Americans and museum professionals. The broad range of projects being undertaken by grant recipients include: a repatriation award to the Pawnee Tribe of Oklahoma to rebury over 400 ancestral remains which were previously located in three different museums, as well as workshops and training, the coordination of inter-tribal and inter-museum discussions, and hiring repatriation coordinators to prepare and review documentation.

In announcing the awards, Secretary Babbitt praised the 42 projects as "continuing the dialogue between museums and Indian tribes that began five years ago with the passage of the Act." Secretary Babbitt went on to announce that funds have been included in the administration's budget request to continue awarding NAGPRA grants in Fiscal Year 1996.

Specific awards and contacts are listed on the reverse side of this page. Additional information regarding these awards can be obtained from Dr. C. Timothy McKeown, NAGPRA Program Leader, Archeological Assistance Division, National Park Service, P.O. Box 37127, Washington, D.C. 20013-7127

-over-

P.O. Box 37127

Washington, DC 20013-7127

FISCAL YEAR 1995 GRANTS TO ASSIST IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA)

LIST OF AWARDS AND CONTACTS

| | |
|--|--------------------|
| Bering Straits Foundation, Nome, AK [Vernon Olson: (907) 443-5252] | \$74,960 |
| Central Council of Tlingit and Haida Indian Tribes of Alaska, Juneau, AK [Cheryl Eldemar: (907) 586-1432] | \$51,675 |
| Cheyenne River Sioux Tribe of South Dakota, Eagle Butte, SD [James Picotte: (605) 964-2542] | \$63,430 |
| Children's Museum, Boston, MA [Joan Lester: (617) 426-6400 x261] | \$18,040 |
| Coquille Indian Tribe, Coos Bay, OR [Troy Anderson: (503) 756-0662] | \$29,750 |
| Denver Art Museum, Denver, CO [Nancy Blomberg: (303) 640-7572] | \$57,270 |
| Detroit Institute of Arts, Detroit, MI [Dr. David Penney: (313) 833-1432] | \$14,580 |
| Eastern Shawnee Tribe of Oklahoma, Seneca, MO [Leroy Ellis: (918) 666-2435] | \$64,080 |
| Field Museum of Natural History, Chicago, IL (2 projects) [Dr. Jonathan Haas: (312) 922-9410 x641] | \$106,785 |
| Fort Lewis College, Durango, CO [Dr. Philip Duke: (303) 247-7346] | \$54,460 |
| Gila River Indian Community, Sacaton, AZ [Dr. John Ravesloot: (602) 562-3301] | \$53,160 |
| Haffenreffer Museum of Anthropology, Brown University, Bristol, RI [Thierry Gentis (401) 253-8388] | \$28,450 |
| Hannahville Indian Community, Wilson, MI [Patricia Peterman: (906) 466-5561] | \$67,050 |
| Illinois State Museum, Springfield, IL [Dr. Robert Warren: (217) 524-7903] | \$82,105 |
| Jamestown S'Klallam Tribe, Sequim, WA [Elizabeth Mueller: (360) 683-1109] | \$74,005 |
| Kaibab Band of Paiute Indians, Fredonia, AZ [Angelita Bullets: (602) 643-7214] | \$73,325 |
| Kaw Nation of Oklahoma, Kaw City, OK [Steve Pensoneau: (405) 269-2552] | \$73,285 |
| Kenaitze Indian Tribe, IRA, Kenai, AK [Rita Smagge: (907) 283-3633] | \$73,835 |
| Mille Lacs Band of Chippewa Indians, Onamia, MN [Brenda Boyd: (612) 532-4181] | \$71,455 |
| Mohegan Tribe, Uncasville, CT [Melissa Fawcett: (203) 848-2121] | \$64,455 |
| Muscogee (Creek) Nation, Okmulgee, OK [Alan Cook: (918) 756-8700] | \$70,055 |
| Museum of Texas Tech University, Lubbock, TX [Mei Wan Campbell: (806) 742-2442] | \$41,255 |
| Nevada State Museum, Carson City, NV [Amy Dansie: (702) 687-4812] | \$26,305 |
| Office of Hawaiian Affairs, Honolulu, HI [Linda Delaney: (808) 586-3777] | \$45,160 |
| Oneida Tribe of Indians of Wisconsin, Oneida, WI [Susan Daniels: (414) 869-2768] | \$47,350 |
| Pawnee Tribe of Oklahoma, Pawnee, OK [Helen Norris: (918) 762-3649] | \$7,500 |
| Peabody Essex Museum, Salem, MA [John Grimes: (508) 745-1876] | \$18,930 |
| Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA [Dr. David Pilbeam: (617) 495-2254] | \$74,935 |
| Quartz Valley Indian Reservation, Fort Jones, CA [Cora Thom: (916) 468-5409] | \$57,490 |
| Research Foundation of SUNY-Binghamton, NY [Dr. Nina Versaggi: (607) 777-4786] | \$74,915 |
| Rome Historical Society, Rome, NY [Barbara Schafer: (315) 336-5870] | \$35,170 |
| Standing Rock Sioux Tribe, Fort Yates, ND [LaDonna Brave Bull Allard: (701) 854-2120] | \$53,500 |
| Tanadagusix Corporation, Anchorage, AK [Ron Philemonoff: (907) 278-2312] | \$71,070 |
| University of Alabama, Moundville, AL [Eugene Futato: (205) 371-2266] | \$91,570 |
| University of Alaska Museum, Fairbanks, AK [Gary Selinger: (907) 474-7505] | \$22,005 |
| University of Nevada, Las Vegas, NV [Vicki Cassman: (702) 895-3590] | \$26,305 |
| University of North Carolina at Chapel Hill, NC [Dr. Vincas Steponaitis: (919) 962-6574] | \$72,805 |
| University of Pennsylvania Museum of Archaeology and Anthropology, Philadelphia, PA [Dr. Jeremy Sabloff: (215) 898-4000] | \$8,190 |
| White Mountain Apache Tribe, Whiteriver, AZ [Ramon Riley: (602) 338-4625] | \$55,590 |
| Yakutat Tlingit Tribe, Yakutat, AK [Frances Lekanof: (907) 784-3238] | \$64,390 |
| Zuni Indian Tribe, Zuni, NM [Roger Anyon: (505) 782-4814] | \$72,555 |
| TOTAL | \$2,233,200 |

TESTIMONY
BY
THE CHAIRMAN OF THE
STANDING ROCK SIOUX
TRIBE

JESSE TAKEN ALIVE

December 6, 1995

Good Morning. My name is Jesse Taken Alive, and I am Chairman of the Tribal Business Council of the Standing Rock Sioux Tribe. I am here today on behalf of the North Dakota Intertribal Reinterment Committee, which represents all of our state's tribes, the Turtle Mountain Band of Chippewa, the Devils Lake Sioux Tribe and the Three Affiliated Tribes. I would like to extend my appreciation from our tribal governments to Chairman McCain and the Senate Committee on Indian Affairs for holding this important hearing today, and I would also like to deliver a special "thank you" to our North Dakota delegation, Senator Dorgan and Senator Conrad, for your unflagging support of our tribes in this critically important issue.

Chairman McCain and Members of the Committee, if ever there were a time to speak plainly, that time is now. We therefore wish to state that we have encountered serious problems in our efforts to make the Native American Graves Protection and Repatriation Act do what Congress intended it to do: bring home our relatives, their personal burial belongings, and our items of sacred and cultural patrimony. We are not satisfied with the limited level of input and representation given to tribes throughout the regulatory process. For nearly two years, our Committee has met with other tribes across the nation and we have discussed with them many of the serious problems we bring to your attention today. Through our Intertribal Committee, our tribes have been extremely vocal in our opposition to the restricted access to the proposed final regulations, and today we ask you a simple question: Why? Why are we not allowed the basic right to see for ourselves what has been incorporated in proposed regulations which once were only 15 pages long, but are now over 140 pages? What is there to hide, if indeed something is being hidden from us? It may be that there will be no substantial problems with the proposed final regulations, and that will be a fine thing. But we can find no justifiable reason for the

arbitrary, administrative decision to keep these regulations from the eyes of the very people the law was passed to protect. Indeed, had we been allowed to review the proposed final regulations 18 months ago when we made our first request to Secretary Babbitt, we would have final regulations before us today.

Serious problems exist within the process of promulgating regulations, beginning with the failure to seat the members of the NAGPRA Review Committee in time to meet the statutory deadline. Before this mandate was met, moreover, three drafts of regulatory language were compiled by an Interagency Working Group, consisting only of federal employees, with no input from Native people or tribal officials. When appointments were finally made, the new members of the NAGPRA Review Committee began doing their job of promulgating regulations with the third draft of regulatory language. It is easy to see how the "tone" of the draft regulations was already set before Native people had any involvement in the process.

NAGPRA, if nothing else, is a series of compromises between Native nations and the science and museum industries, but it was also created as a mechanism to initiate sorely-needed dialogue between Indian Country and these industries. If our participation in the dialogue is limited to living with final regulations which have been primarily shaped by federally-employed members of these communities, then nothing will have changed, and NAGPRA's original intent of creating bridges will have failed. Also, Dr. McManamon of the Park Service has told us that all of our concerns have been "resolved" in the Preamble of the proposed final regulations, yet we know that seldom is the Preamble consulted when interpreting the law, moreover, the Preamble is not a legal document, and would be of no use to us in a litigative situation. Of fundamental

importance to us is the need to determine whether or not the proposed final regulations reflect the letter, the intent and the spirit of the law. Senators, what we are asking for is not unreasonable, and we feel certain that if it were *Native* people who were passing laws and writing regulatory language so that *you* could repatriate *your* relatives' bodies and sacred things from *us* and *our* museums, you would feel the same way.

Members of the Committee, we are compelled to refer to a directive given by President William Clinton over two years ago. In his Executive Proclamation on Indian Affairs President Clinton stated, "The United States is bound by a special trust relationship, requiring the Congress, the President, and all entities of the federal government to assure that 'the good faith shall always be observed towards the Indians', as provided in the Northwest Ordinance of 1781 . . . legal documents shall be interpreted liberally in favor of the tribes and as the tribes would have understood them." In our view, limits placed upon tribal participation in development of regulatory language for this precedental law, such as the Park Service's refusal to allow tribes another review and comment period with the proposed final regulations, ignores such "good faith" mandates and makes a mockery of present and future efforts to normalize tribal relationships with federal agencies, museums and the science community.

One of the most serious issues we raise today relates to language that was added to the statutory definition of tribal lands, and which was also extended to human remains and associated funerary objects. The statute is very clear in its definition of tribal lands, when it states that "tribal land" means (a) all lands within the exterior boundaries of an Indian reservation, and (b) all dependent Indian communities. The Act does not raise the issue of a 5th Amendment Taking in the context

of tribal lands, human remains or associated funerary objects, yet an interpretation has been made which does not comply with the law or the President's directive, and we repeat: "(L)egal documents shall be interpreted liberally in favor of the tribes and as the tribes would have understood them." In the Act, 5th Amendment language appears only in the definition of "right of possession", referring only to unassociated funerary objects, sacred objects, and objects of cultural patrimony. There is no justification for extending a 5th Amendment Taking to human remains, associated funerary objects and tribal lands, which, we understand from Dr. McManamon, occurs in the proposed final regulations. Attorneys Jack Trope and Walter Echo-Hawk, two authors of the Act, were concerned about this development as well, and submitted testimony which we quote here: "The control and possession definitions (Sec. 10.2 (e)(5) and (6) are simply inappropriate. To link possession with a cognizable legal interest of the sort described could create a rather large loophole by which significant numbers of items possessed and displayed by museums on a long-term basis could not be said to be 'possessed' by them within the meaning of the term in the regulations. The definitions essentially change the statutory standard from 'possess or control' to 'have a legal interest in'. It is questionable under the common law whether museums (or private landowners) 'have a legal interest in' human remains sufficient to do anything with them. The terms 'possession and control' should be given their ordinary and customary meaning in the regulations. The takings exception recognized in 25 U.S.C. 3001 (13) is the protective device for insuring that the temporary possession of the items by museums does not result in an illegal transfer. The 'possession', and to a lesser extent, 'control' definitions cannot be used to achieve this purpose and would contravene the statutory scheme."

Senators, in light of this reinterpretation of the Act, we refer you once again to the President's Proclamation, and we quote,

"The United States shall forever respect and protect the inherent sovereign authority that the American Indian and Alaska Native tribal governments have exercised since time immemorial."

"The United States shall forever continue to respect and protect the government-to-government relationship with American Indians and Alaskan Native tribes, a relationship principle that historically has been a cornerstone of this Nation's official Indian policy."

And Senators, with respect to the reinterpretation of the Act's definition of tribal lands, we ask that you pay special attention to the last sentence in this quote:

"The United States shall support and assist American Indian and Alaska Native tribes in exercising broad sovereign tribal authority over all places, persons, property, and even within their territorial jurisdiction, and shall preserve and protect the taxation authority of tribes."

If a 5th Amendment Taking is extended to the definition of tribal lands, it will effectively deny tribes their right to exercise "broad sovereign tribal authority" over lands within their exterior boundaries that cradle the unmarked burials and burial mounds of our ancestors. If this is allowed to go final, we will once again be forced to stand helplessly by when someone wants to take something from us, but this time we will not be watching our lands or resources disappear, we will be watching our loved ones, our ancestors, and their self-evident human right to rest in

peace, disappear *from our own homelands*.

Gentlemen of the Committee, time prevents us from discussing in detail the many other problems and concerns we find with the proposed regulations and the method in which they have been drafted, however, we provide here a partial list of the other issues, and will submit more detailed written testimony regarding these problems in the next few days. We respectfully ask your attention in the following matters:

- The definition of “Indian tribes” is problematic since it will exclude those indigenous nations which are not federally recognized but still maintain a responsibility toward their ancestors and their items of sacred and cultural patrimony.
- While tribes are being required to divulge sacred and thus secret information regarding their items of sacred and cultural patrimony, federal agencies and museums are not required to protect the confidentiality of this information.
- Museums are determining what is “sacred”. We submit that the museum and science industries have no expertise or even the necessary knowledge to make this determination, which can only correctly be made by tribal spiritual leaders.
- Federal agencies involved in the 1940’s Missouri River Basin Survey archeological project have “given” remains and burial belongings which were excavated from federal lands to the Smithsonian Institution in what we fear is an attempt to prevent their repatriation before extensive study has been conducted on them, since NAGPRA clearly states that “the Act shall not be construed to be an authorization for the initiation of new scientific studies...” We have recently learned where, through a Memorandum of

Understanding, the Bureau of Reclamation “gave” remains excavated from their lands to the Smithsonian Institution, and did not comply with NAGPRA’s mandate to complete an inventory of these human remains and funerary objects.

- Assistant Secretary Ada Deer refused to sign off on a majority of the proposed regulations until another publication and comment period are held. She did, however, sign off on those sections of the regulations needed to implement the summaries and inventories sections, which then trigger the Civil Penalties section. This “piecemeal” attempt at finalizing regulations did not include the Civil Penalties section, which from reading the previous complaint, is sorely needed. Why is this? Also, the National Park Service is required to fulfill NAGPRA’s mandates, so why have they been made the regulatory authority for compliance? Who will regulate this agency if they are out of compliance?
- Another section of proposed regulations which would have been triggered under the summaries and inventories section mysteriously disappeared after our tribes objected to language which we felt failed to protect our rights. This was an entire section which allowed tribes and federal agencies to determine together the treatment of unmarked burials found on federal lands. Agreements of this nature are significant empowerment tools for tribes and they should be encouraged, not repressed.
- Please investigate whether certain museums like the Chicago Field Museum still maintain internal polices which will prevent the repatriation of human remains of great antiquity.
- Statutory language is silent regarding the repatriation of human remains incorporated into other items. However, once again, the law has not been interpreted liberally in favor of

tribes because the regulations prevent the repatriation of human remains incorporated into other items, such as scalps on war shirts.

- Various meetings of the NAGPRA Review Committee have raised the issue of scientific study of human remains to new and more frightening levels. For example, Dr. Phillip Walker of the Review Committee and Dr. Douglas Owsley of the Smithsonian Institution have held protracted discussions calling for DNA analysis of Native remains, and other tests that result in destruction of the remains themselves.

Chairman McCain and members of the Committee, we close with a proposal for a solution to the problems we have raised with you today. After nearly two years of discussions with other tribes, and careful consideration of the problems, we conclude that a very simple resolution is at our fingertips. We propose that this Committee direct the NAGPRA Review Committee to consult with regional coalitions of tribal NAGPRA representatives to re-work the proposed regulations, send a copy of their final draft to all tribal governments for their review and comment, thus providing balance to a legal document that will finally represent the interests of our indigenous nations. These regional coalitions can be helpful in resolving other innate problems with the Act, such as reaching consensus on the treatment and disposition of culturally unidentifiable human remains.

Honored members of the Committee, we have today witnessed another step toward improving the government-to-government relations between our Nations and the United States. By holding today's hearing, you have given us something we have struggled for for nearly two years: today we have been heard. We respectfully request your immediate attention and action on the critical matters we have raised today, and we are looking forward to your response. We thank you for

what you have done to make this historic and precedental law do what it was intended to do: open the door to the Spirit World, one final time, for our loved ones, and begin the healing process by returning the sacred things we need to revitalize our Nations.

**Comments To the Senate Committee
on Indian Affairs**

**Regarding : Supplemental Questions to
Oversight Hearing on P.L. 101-601**

**Submitted By : Jesse Taken Alive, Chairman
Standing Rock Sioux Tribe**

**To : Senator John McCain , Chairman
Senate Committee on Indian Affairs
Room 838 , Senate Hart Office Building
Washington , D.C. 20510**

Jesse Taken Alive
Chairman

Wilbur Red Tomahawk
Vice Chairman

Elaine McLaughlin
Secretary

Carol White Eagle
Cannonsball District

Tom Kung
Fort Yates District

Leonard Bearling
Wakpala District

Samuel "Chuck" Claymore
Kenedi District



Joe White Mountain, Sr.
Bear Soldier District

Kenneth Red Bear
Rock Creek District

Jim Jamerson
Little Eagle District

Luella Harrison
Porcupine District

AT LARGE

Charles W. Murphy
Joe Keepsagle
Dave Archambault
Terry Yellow Ear
Reva Gates
Shanon Two Bears

January 25, 1996

Senator John McCain, Chairman
Senate Committee on Indian Affairs
Room 838, Senate Hart Office Building
Washington, DC 20510

Honorable Senator McCain:

We hope this letter finds you in good health and spirits and enjoying life. On behalf of all North Dakota tribes, we want to thank you for your letter of December 15, 1995, in which you invited us to respond to several questions regarding issues that were raised at the Oversight Hearing your Committee held on December 6, 1995. We are very thankful to you for presenting us with these questions, Senator McCain, and for making our response a part of the public record of the Oversight Hearing.

We wish to express our sincere gratitude for this long-awaited opportunity to express ourselves and to be heard. Our tribes' NAGPRA representatives have provided much of the responses submitted herein. Senator, they can speak with the voice of experience, based upon ten long years of working in the reburial and repatriation issue, responding to one

obstacle after another, as you will soon see for yourself. Through the members of the North Dakota Intertribal Reinterment Committee our tribes tried to sound a warning years ago about many of the issues you raised, particularly those dealing with new ruling from Hawaii, in an attempt to prevent the predicament we are in today. You can imagine our relief and gratitude that you heard us, Senator McCain, and gave us this once-in-a-lifetime opportunity to share our concerns, problems and proposed resolutions with you and the rest of the Senate Committee on Indian Affairs. Thank you for listening and responding so quickly and decisively.

In addition to providing complete responses to all the questions, we are submitting our summary of the Hawaii ruling, and our opinion as to its overall soundness and potential impact upon all Native peoples. We are grateful to Senator Inouye for brining this to our attention - there are grave matter therein that all Native peoples need to consider and prepare for. We have included several documents to provide justification and documentation for many of the issues we shared with you in our response. If you have any questions, or wish further information, please do not hesitate to contact me.

Sincerely,



Jesse Taken Alive
Standing Rock Sioux Tribe

enclosures

Comments to : Na Iwi O Na Kupuna O Mokapu, Heleloa, Ulupau A Me Kuwa'a'ohē

Vs. John Dalton - Civil No. 94-00445 DAE - Filed July 25, 1995

This court case raises a series of concerns mostly generated by the Public Law 101-601 itself. Certain policies were clearly not established in the policy making process and presumably would be addressed in the regulatory process. In defense of the law, it was to be all inclusive with Native Americans and Native Hawaiians, which may be understood that any federal action brought against any federal agency, museum, or institution that is mandated to comply with the law would have a superficial effect on all inclusive of the Act.

In defense of the Native Americans and Native Hawaiians, one needs to understand the cultural diversity of the two groups mentioned in the Act and are mandated to follow procedural guidelines to make a request of any kind under the Act. Although the law groups these individuals together, it is understandable that the law makers did know the diversity in both cultures and may have understood that to some degree that the precedence set in any adjudication may negatively effect the remainder. Tribes to some degree may not have the resources to litigate a issue against a federal agency or museum, thus would take a back seat approach to their issue and would have to wait or live with a decision detrimental to their concern.

Issues and concerns :

1). The Federal Defendant awarded a contract to the Bishop Museum to prepare a inventory of the human remains disinterred from the Mokapu Peninsula in compliance with section 3003 of NAGPRA :

This process needs to be recommended to the National Review Committee for review on the basis of whether a federal agency has the authority to relinquish his holding to any other entity to comply with the mandate of NAGPRA. The law addresses the definition of museum as meaning " any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency ". Federal agency " means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution ". One can see that the

statutory law never allowed the relinquishment of a holdings under the authority of a given Federal agency, museum or institution. Also, the National Review Committee should also consult with the Native American and Hawaiians to establish a curatorial program universal to all museums, institutions, and Federal agencies, since this was a question in the court case. Finally, the word *study*, including the terms methods, examination , techniques, or additional research, needs to be clarified by Congress since these terms are referenced continuously (in ex. " standard physical anthropology techniques ", page 3 of court case). The Native Americans and Native Hawaiians need to understand what is being performed on the human remains.

2). Human Remains are deemed Cultural items :

This issue is addressed in 25 USC 3001 (section 2. definitions (3.)). Congress needs to amend the law to clarify this portion of statutory law. We recommend deleting the wording of **human remains** from this section "cultural items". This in itself will clear up a lot of future discrepancies that would be a major focal point in any litigation. If this option is not open to the Tribes or Native Hawaiians, then Congress needs to clarify this standing issue.

3). Standing :

In reference to the Presidential Executive Proclamation which states " The United States is bound by a special trust relationship, requiring the Congress, the President, and all entities of the Federal government to assure that ' the good faith shall always be observed towards the Indians', as provided in the NorthWest Ordinance of 1781 ... legal documents shall be interpreted liberally in favor of the tribes and as the tribes would have understood them.", the tribes and the Native Hawaiians need to remind Congress of this proclamation in reference to the issue and status of human remains. Currently under this decision, the issue of whether human remains have standing in a court of law has been decided and ruled that they don't. Requirements may be needed to protect the issue of standing if the court relied only on the common law requirements, which was not created for the requirements of NAGPRA. The question of guardianship to human remains has always been an important part of any given culture, whether it has been addressed in federal , state, or tribal law. The Congress needs to clarify this important aspect of the court case, knowing that this issue will surface in all litigation dealing with the human remains issue. Congress needs to provide a expressed provision granting standing and guardianship to regional coalitions, tribal groups and Native American , Hawaiian, individual(s) to satisfy the requirements of NAGPRA, including consultation.

4). Additional Scientific Research :

Although NAGPRA does not allow for or authorize any additional scientific study in 25 USC (section 5 (b) (2)), it also contradicts it to the effect that in the absent of documentation, it allows study to determine cultural affiliation, origin. Congress needs to impose limited study or research restrictions to safeguard this very sensitive portion of the law. In light of the issues raised in this court case, which was prior to any direction given in the form of regulations, we recommend that Congress needs to review all issues we raise in this letter of response. Congress does have a trust responsibility to all the Native Americans and Native Hawaiians to protect our vested interest and protect the spirit and intent of NAGPRA. All issues raised in the Hawaiian court case, if not addressed, will dismantle the very efforts of all who had contributed to the enactment of this very important Act.

5). Trust Responsibility :

The court ruled on the trust responsibility, citing *Doski v. Goldseker Co.* (4th Cir. 1976) and *United States v. Deluxe Cleaners and Laundry, Inc.* (4th Cir. 1975). "This court has previously found that the federal government has no trust responsibility to Native Hawaiians where the relevant statutory language does not explicitly indicate a trust duty." The court also views 25 USC (section 12) as a disclaimer clause.

We would recommend that Congress fulfill its directive in the Presidents Executive Proclamation, and direct the Federal agencies, museums who received any federal funding , that

they will carry out the mandates of NAGPRA and they do have a trust duty to the Native Americans and the Native Hawaiians. .

6). The Inventory is subject to FOIA :

The court determined that the inventory information is subject to FOIA because it does not meet any of the nine exemptions. The Federal government is well aware of the sensitivity within this issue with tribes. Not only are the tribes constantly fighting to protect their sovereignty, land base, language, culture, religion and human remains, they now have to protect various information critical to our very existence. Does the disclosure violate the rights of tribal members, tribes in certain confidentiality or privileged information on religious practices, and our spirituality when certain individuals or interest groups would exploit our ways for monetary advancement, if it is mandated to be published in the Federal Register ? Congress must amend the law to have this included as a withholding statue and if not, at a minimum, restrict information to be published in the Federal Register, limited only to notification of a repatriation request, stating the area if known of acquisition, number of items, and list potential tribes.

Congress needs to also define inventory, scientific studies, and scientific information in order to explicitly imply what is restricted and what is not, if Congress does not make NAGPRA a withholding statue. One question needs to be asked by Congress and the tribes is how did the scientific community or museums arrive at the \$500.00 to \$600.00 dollar figure needed per human remain to establish origin. The type of study needed to determine tribal affiliation, and what is the dollar amount to determine this? Also, what is the process to document or confirm ethnicity from a physical anthropological point of view,as cited in the court case on page 35 ?

Page 4

The Hawaii court ruling needs to be fully reviewed by the committee or the Solicitors office to review the impact it has on NAGPRA. We recommend this and also to consult with the tribes in the Nation on the approach they will be taking. It is obvious that the ruling may have a effect on the final regulations currently being implemented.

One point that stands out and is one of the major factor in the case is compliance. The defendants position in his capacity was that absent of no direction in the form of regulations, the issue of study was left up to interpretation and the court looked in that direction, also in the house reports, the testimony on the bill during testimony, and documentation on the history of the law during formation. This raises a serious question to compliance to the law, how this ruling plays with the interpretation of the regulations, and how compliance will be approached. Currently, we understand different Federal agencies and museums are approaching the law on how additional information or study is needed for compliance. The second serious concern and may be the most frightening, is if the Federal agency or museums *can* turn over their collections to another entity for inventory and compliance to the mandate of NAGPRA. We understand this is unallowable but now may take this avenue because of this ruling. We recommend that the Senate Committee on Indian Affairs, and the Congress correct this situation and restore language that is very clear to Federal agencies and museums that they have a clear responsibility to the mandates of NAGPRA. We also may point out that we are aware of Federal agencies (particularly the National Park Service, The Army Corps Of Engineers, Bureau of Reclamation, to name a few) who are contracting this responsibility out already, or making Memorandum of Understandings with the Smithsonian Institute or others, on completing their responsibility to the mandate of NAGPRA. If the National Park Service is delegated the responsibility from the Secretary of the Interior to oversee compliance to the law and want to be the regulators, *we ask again* , who is going to regulate the National Park Service on compliance to the law, Congress ? We request that the Senate Committe on Indian Affairs investigate this question personally, and ask the Review Committee and the National Park Service, are any of the Federal agencies in compliance ,is this happening ? The Standing Rock Sioux Tribe would like a response to these specific questions and suggest you follow up with the three Federal agencies we mention to see if their is merit to this issue we raise. Only then will you understand that these and numerous issues we have raised at nearly all the National Review Committee meetings during public testimony, but have gone unnoticed. Please intervene on behalf of us.

We would also recommend that if legislation is proposed to the Congress and testimony is anticipated, that a member of the North Dakota Intertribal Reinternment Committee be afforded such time to present testimony. If tribal leadership is requested, that a member of the Dakota Territory Chairmans Council be afforded such time to testify.

We would like to thank the committee for requesting a response to the Hawaii decision. Should any additional information is needed, please feel free to contact myself, Jesse Taken Alive, Chairmen of the Standing Rock Sioux Tribe, 701-852-7201 . Thank You .

QUESTION 1, Page 1, McCain Letter: Is it possible to create tribal/museum agreements to protect confidentiality?

When our tribes first reviewed the proposed regulations in May of 1993, we reacted strongly to language which (a) accepted as fact museums' questionable ability to determine tribal affiliation of our remains (b) museums' ability to determine what is sacred to us and (c) never addressed whether or not sacred information would be protected or restricted. Our tribes submitted written testimony to the National Park Service in 1993 objecting to regulatory language giving museums and federal agencies the ability to determine what, among their collections, is sacred, as well as the tribal affiliation of human remains in their possession. We foresaw many inherent problems in this proposal, including the issue of confidentiality. We were aware that the NPS planned to publish detailed listings of repatriated human remains and other items of sacred and cultural patrimony, and instead advised them to publish general statements in tribal newspapers or other media located on or near affected reservations, or to have letters sent directly to other tribes who may have an interest in the materials. We advised this action because we were concerned about the safety of the remains and burial belongings once the public discovered where they had gone. But the Park Service was adamant and the language stayed in the regulations.

The fact that determinations of "sacredness" have now been left to our biggest opponents in the issue has created the present situation where tribes are also required to divulge sacred (and very often secret) information in order to identify sacred objects and prove our current or continuing use of these objects. The law's current inability to restrict access to this sensitive information by any person is truly the icing on the cake - the real problem is that we tribes, who alone could be said to have "expertise" regarding our sacred things, have been totally circumvented in a critical decision-making area, and the power to control what is repatriated has been handed over to our most active opponents, probably all of whom come from a totally foreign culture which has no true knowledge of our sacred life.

Unless all museums and federal agencies have to restrict access to sacred information or knowledge by any person for any reason, we do not see the feasibility of future agreements on the matter. We believe this restriction will have to apply to all records dealing with our ancestors' remains, all items of sacred patrimony, and perhaps to items of cultural patrimony as well. We discuss below the reasons for our position.

It may be that some tribes will be less sensitive to this issue; however, we can speak only for our tribes from the cultural/spiritual perspectives and responsibilities that we have. In addition, the option of agreements is already available to tribes under 25 USC, Section 11 (1)(b) of the Act in the section entitled "Savings." The question remains, however, as to whether or not museums and federal agencies will agree to this type of restriction. If they don't (or can't) agree to such restrictions, what will be the tribes' option then? We believe the only answer will be to amend the statute so that tribes' individual needs are met. We believe that any such amendment **must give tribes the ability to determine for ourselves what is sacred** in a given museum's or agency's collections, and also allow tribes to decide for themselves whether or not to share sacred knowledge with the public or keep it

restricted. Only then will the process have been made flexible enough to meet the diversity in value systems and beliefs present among Native peoples today.

Again, we believe that not all information must fall into this restricted category, indeed, only two types of information need be restricted: (1) information relative to the repatriation and reburial of specific human remains and funerary objects should be restricted to anyone except appropriate tribal NAGPRA officials who may have an interest, and (2) access to all information relative to the identification of our tribes' sacred objects must be restricted to any person for any reason.

We realize that cries of censorship will be heard when the science and academic communities are faced with the position we have taken; however we also realize what will happen to information about our sacred things if steps are not taken now to ensure that it is kept confidential: first, it will be collected, catalogued and curated the way the contents of our ancestors' graves have been all these years; then, it will be loaned to various scholars and academicians as fodder for a whole new round of papers, articles and books. They will be paid handsomely for their efforts, thus perpetuating and ensuring their status quo. Our sacred knowledge will enhance and upgrade their reputations and their resumes. This will be particularly true of those scientists and scholars who "specialize" in a certain tribe or geographic region. Once this information is published, the "New Age" communities will also exploit and sell our sacred knowledge in pseudo-ceremonies along with others they are already selling to unsuspecting, needy consumers. And we Native people will forced to watch as, once again, our sacred and spiritual culture is "mined" by the dominant society. **It must also be said that much of this sacred knowledge is restricted to certain elders and medicine people among our tribes - not even all of our tribal members have access to this information!**

Another problem with determinations made by others outside our culture: we have an instance where the North Dakota State Historical Society failed to (a) return to our tribes three shell masks which had been identified by former staff at that agency as burial objects associated with human remains excavated from a large burial grounds and released to us in a previous repatriation and (b) failed again to list those burial objects in a NAGPRA inventory because, suddenly, they're no longer considered by current staff to be burial objects. To us, anything found near, in or on top of a burial site is holy because it belongs to the spirits. The Society, however, does not want the words "sacred" or "holy" associated with these masks, because they want to **keep** them. If we hadn't known those burial objects existed, we would not have been informed of them through the process required by NAGPRA, nor would we now be able to begin the dispute resolution process. This is what happens when museums and federal agencies are allowed to determine what is sacred, what is a funerary object, and what tribe remains are affiliated with.

Because the science and museum industries have been given the right to make these determinations, and to put things bluntly, we do not trust that we have been given a full accounting of all the collections, how are we to fulfill our responsibilities in bringing home all of our relatives and sacred belongings available to us under NAGPRA? By trusting

that our biggest opponents in the repatriation struggle will give us all the facts we need to repatriate our sacred and cultural property? What about matters in which they have no expertise, such as what is "sacred" to *us*? The fact that there is no test method available today which conclusively identifies the tribal origin of Native human remains also gives rise to many other questions and doubts about why the museums were allowed to make these determinations. **We must be allowed to decide for ourselves, Senator McCain, the treatment and disposition of all human remains excavated from our aboriginal homelands, as well as the treatment and disposition of human remains for which original location is unknown and how much, if any, of our sacred knowledge will be made available to the public.**

For us, this is not an issue that can be resolved on a case-by-case basis. We cannot allow any sacred information or knowledge about any of our sacred objects to be recorded or otherwise retained by museums or federal agencies, unless that information is tightly sealed. Senator McCain, please try to see things from our viewpoint: we lost our homelands, we lost our rivers, our mountains, our burial grounds; we are losing our languages, our stories, our cultures. We want to say to America, "Please, please, just let us keep our religion, our spiritual way of life, to ourselves! We are almost losing that too!" Of all the ethnic groups present in our homelands today, indigenous people in America have been singled out for a level of exploitation, robbery, appropriation and study unrivaled anywhere else in the world. We have withstood, and borne, and survived this institutional genocide for over five hundred years. We just want it to stop. We just want to be left alone, to regain control of our lives, our histories and cultures, and our future as Native peoples. Is that asking so much? We don't think so.

QUESTION 2, Page 1, McCain Letter. (A) Do you still feel that regional tribal coalitions should be established?

Now more than ever, regional tribal coalitions are needed to provide input, direction and expertise to the NAGPRA Review Committee, the National Park Service, and the Secretary of Interior. Several critical sections of draft regulatory language dealing with "Reserved" sections of the law are soon to be published for public review and comment. Remember, these sections were placed in "Reserve" status by the Park Service, due to their controversial nature. **We submit that tribes must have meaningful representation and input into all discussions regarding these draft regulations.** Who knows how many drafts have already been written and discarded by now, all without one iota of input from the very people who will be directly impacted by the language therein?

Moreover, NAGPRA Review Committee member Dan Monroe told us a few years ago something we already knew and worried about: after inquiring why we were putting so much energy into opposing the current set of draft regulations (now finalized), he stated that the "REAL battle is going to boil down over the unaffiliated and unclaimed human remains." (Washington, DC meeting of the NAGPRA Review Committee, Sept. '93.) We knew then and we know now that what he said is true: for that alone we Native peoples need a direct, meaningful role in the development of all future regulatory language if we are going to adequately respond to the impending battle over our poor relatives who defy Western scientific identification methods. For over a decade now, the North Dakota tribes have maintained the following position on our relatives' remains: **If they are Indian, if they come from our collective aboriginal homelands, they and their personal belongings must be returned to us for reburial on Indian lands.** Anything less would be an abrogation of their self-evident human right to rest in peace, and a negation of our responsibilities to our ancestors, a duty to return them to and protect their sacred resting places.

We have discussed this position with tribes from Maine to Washington state, from Florida to southern California, and many, many points in between during the last ten years. We have met with almost unilateral agreement from scores of other tribal NAGPRA representatives on this issue. Those who did not agree did so only because their spiritual beliefs do not place the same *value* on human skeletal remains; even so, however, many of these tribes expressed the desire to have them removed from display or curation in museums. Because many indigenous nations formerly or currently share aboriginal homelands, and because they also subsequently share similar spiritual values where reburial and repatriation are concerned, the proposal to direct Secretary Babbitt and the Park Service to work directly with regional tribal coalitions is not only sound and practical for the federal government, it is the quickest, most economical and convenient way we can find to achieve consensus on NAGPRA-related issues in Indian country today.

Moreover, as we said to you before Senator, we maintain that the serious problems inherent in the final regulations represent major Indian policy changes successfully and craftily conducted through the regulatory process. We need direct and

meaningful input to prevent this from happening again with the critical "Reserved" sections!

Senator McCain, you will see in our answer to Question #3 that we had serious doubts from the beginning about the NAGPRA Review Committee's ability or even willingness to reflect our concerns and issues in the regulations. Of the three Native members appointed to the Committee, one of them did not understand the language used in the process because English is not his first language, and repeatedly informed the rest of the Committee of this fact. The other two members both admitted that they did not understand the language or the process either. The remaining four members come from the museum or science industries. Our response to that is this: what were they doing on such an important Committee? Were our rights protected by them? Did they speak up for us?

Did they provide us with direct, meaningful representation on critical matters, such as the reinterpretation of Indian lands? Such as who decides what is sacred? Were the Native members listened to by Secretary Babbitt and the Park Service, or simply exploited? Our own tribal NAGPRA representatives all but three meetings of this Committee, and only twice did we see one of these Native members speak up in defense of tribes. These defenses came from the man for whom English is a foreign language. We feel in many instances that they did and continue to do their best - but it was **not good enough, it wasn't what was needed**, obviously, to keep the final regulations from gutting the law of its protections to tribes.

In another instance, however, where the unaffiliated and unclaimed human remains are concerned, one of the Native Committee members, Chairwoman Tessie Naranjo, openly and angrily disputed our tribes' offer to rebury all of these remains in the event there was no one else to care for them. We feel she neglected her duty to listen to, weigh, and represent ALL indigenous nations' values in this regard, but in response to her reaction we proposed the idea of creating **regional tribal coalitions** who would each determine by consensus the treatment and disposition of all unaffiliated human remains that come from their respective regions, based upon their respective value systems and beliefs. This leaves the issue of what to do with those poor Old Ones who cannot be culturally affiliated and there is no available knowledge about the location of their original burials. Again, this determination should be left in the hands of tribes, and it is one which can be made collectively by the regional tribal coalitions. Our tribes' offer to rebury them on Indian lands still stands.

We have been convinced of the feasibility of these coalitions for many years, Senator, and have proposed these coalitions to the NAGPRA Review Committee at its meetings at Phoenix, AZ, Rapid City, SD, Albany, NY, and Los Angeles, CA. The NAGPRA Review Committee must agree with us about these coalitions, as they suggested tribal coalitions work together to decide what will happen with the unaffiliated and unclaimed human remains in their recommendations to Secretary Babbitt. In fact, we feel so strongly about all the benefits of creating regional coalitions of tribal NAGPRA representatives that on February 10 and 11 we will be hosting a conference to which all of the tribes in the United States are invited, for the express purpose of organizing these coalitions, discussing

regional cemeteries versus a large national cemetery for our ancestors, and creating unity on all NAGPRA-related matters. Given the opportunity, we can create solutions which most perfectly suit our needs and, more importantly, the needs of the Pitiful Ones who have languished in museum collections for many, many years. To us, tribal identification means very little in the face of a Spirit Journey - all that matters is that these Old Ones be given the dignity of peaceful rest.

For all of these reasons, it is of paramount importance that Secretary Babbitt, the National Park Service and the NAGPRA Review Committee be required to work directly with regional, tribal coalitions comprised of tribal NAGPRA representatives. These individuals, in our experience, have hard-earned expertise and detailed knowledge of what their tribes are going to need to make NAGPRA do what Congress intended it to do: bring home our relatives and their personal burial belongings, as well as certain items of sacred and cultural patrimony. As you know Senator McCain, the NAGPRA, like most legislation, is a collection of compromises between tribal needs and the needs of the science and museum industries. The situation becomes problematic when individual, sovereign tribes are prevented from negotiating their own compromises, based upon their own needs and interests. Most of us did not negotiate the compromises contained in NAGPRA, indeed, most of us were unaware that compromises were being made in our behalf. **That is why regional, tribal NAGPRA coalitions are so important, so critical to the future: it is the only mechanism we can find which will provide all tribes with a voice.** If we are not allowed more direct participation in the process, and if the process is not changed as our tribes have asked, history will repeat itself, and once again we will watch helplessly as the law is gutted and another dream of equal treatment and justice for Native people fades into obscurity and impotence.

QUESTION 2, Page 1, McCain Letter, (B): To what extent were tribes in your region consulted on the development of regulations?

In our view, the tribes in our region were consulted only to the extent required to meet the minimum standard of law. We submit the following information to illustrate how meeting the minimum standard of law currently does not protect the interests or rights of tribes, nor does it ensure that Congress' intentions are carried out in subsequent regulatory language.

After completing three drafts of regulatory language without notifying or consulting tribes **in any way**, a solicitor from the Department of Interior and National Park Service employees published a fourth draft in the Federal Register on May 28, 1993. Many of the tribes in our region cannot afford to subscribe to the Federal Register, and so were not "consulted" at all, unless the NPS did a special mailing we are unaware of. Even if the NPS did do this, however, it has been our finding that many, many tribes were completely unaware of the passage of NAGPRA until long after the fact, much less cognizant of its language, provisions and meaning sufficient to submit written testimony before the deadline. How's **that** for consultation for you? We should have all been involved in it from the beginning, and that could have been accomplished through the organization of regional, tribal NAGPRA coalitions. Our tribal governments are constantly putting out one fire after another, and do not have the staff or resources to watch everything that Congress does, or respond to calls for testimony in a timely fashion. We must have time to organize, react, and network with one another, and that, Senator McCain, is an integral part of the problem with meeting the minimum standard of the law! It just doesn't **work** for us, it works **against** us, and is often deliberately used in this way to prevent tribes from having more control over their own lands, their own resources, and even their own dead relatives and sacred belongings.

After the sixty-day comment period ended, the only opportunities we had to consult cost our tribes thousands of dollars in travel funds to follow the NAGPRA Review Committee as they conducted their meetings around the country. North Dakota tribes absorbed these costs in a desperate effort to be heard, to change decisions that had already been made without our knowledge or input, to obtain *some* level of input into a process where our role was kept to a minimum, and to raise awareness that things were not right with the proposed final regulations. In our view, the lengths to which we went to create awareness at all levels is commensurate with the seriousness of the problems. We must have more direct and meaningful representation. **Senator, our tribes must be able to represent themselves on matters as important as this.**

Our Tribal leadership used every instance they travelled to Washington, DC, to meet with our Congressional delegates about the issue, and Standing Rock Sioux Tribal Chairman Jesse Taken Alive and Councilmember Tim Mentz even went to the office of Tim McKeown at the National Park Service to obtain a copy of the proposed final regulations, and were refused a copy by McKeown as he held one in his hands! All of our attempts to obtain, through legitimate channels ranging from the Office of the President to the Office

of the Assistant Secretary, a copy of the proposed final regulations for review and comment failed, although we had promises from individuals ranging from NAGPRA Committee members to federal employees from other agencies to provide us with a copy. Our attempts to review the proposed final regulations were made over a period of two years, beginning in September of 1993. Not until the spring of 1995 did we learn that the decision to refuse tribes another review and comment period, allowable by law, was "an administrative, internal decision of the National Park Service," although we had been asking and asking why we were not allowed to see them. (Tim McKeown, NPS, NAGPRA Training Workshop, Haskell Indian Nations University, Lawrence, KS, April 18-19, 1995.) At the Albany, New York meeting of the NAGPRA Review Committee, even Committee members were refused when they asked to see a copy of the proposed final regulations.

Finally, a "bootleg" copy of the proposed final regulations was sent to us by a tribal member from another state. These "bootleg" regulations, already revised (according to Tim McKeown of the NPS, who made this statement to our tribes at a conference held by the Nat'l Museum of the American Indian in Mille Lacs, MN in September of 1995) and thus rather obsolete, were given to this individual by a female employee* of the National Museum of the American Indian, which is **specifically exempted** from the provisions of NAGPRA, and is governed exclusively by the **Museum Act!** What was she *doing* with a copy of the proposed final regulations to implement the NAGPRA, and *how* did she get a copy when access to this information had been repeatedly denied to the very people who are directly impacted by the final regulations? How many other members of the science and museum industries were in possession of these regulations when tribes were categorically denied access?

We believe that the restricted level of consultation and input by Native nations and the total control of the regulatory process by the National Park Service has resulted in the suppression of our rights granted under the law, elimination of protections to tribes intended by Congress, and erosion of tribal sovereignty in major Indian policy changes successfully manipulated through the regulatory process. According to the final regulations, non-Native employees of museums and federal agencies, many of whom have been and continue to be hostile to Native attempts to repatriate, are making determinations about the sacredness of items created by our people, and thus which items will be repatriable to tribes, without the necessary expertise or knowledge, which, we note, is knowledge they will never have. It is *our people*, and *our people* alone, who possess the expertise necessary to inform all decisions made about these items, but we have been efficiently removed from the realm of decision-making. This happened because we were not consulted in this matter, nor were we listened to when we spoke up without the relative luxury of "consultation."

Also according to the final regulations, we will have to watch as private landowners (read non-Indian) within **our own reservation boundaries** do whatever they want to the unmarked burials of our relatives found on their lands! ***That is not what the law says, Senator McCain!*** The reinterpretation of the statutory definition of "Indian lands" flies in

the face of every piece of accepted national Indian policy and legislation existent today. We believe the behavior of the Secretary of Interior and the National Park Service is unconscionable, since they were directed by Congress to carry out its initiatives in the Act, and, we feel, deliberately did not. Had our tribes been consulted on these matters in a more direct and meaningful way, Senator McCain, had we been allowed to represent and negotiate for ourselves, we would not be faced with these crippling problems today.

Because our level of input and control was kept to a minimum, our tribes did everything we could to (a) obtain a more meaningful and direct level of participation (b) stop the destructive process itself through repeated requests, beginning in September of 1993, for an Oversight Hearing to review the problems and issues we raised and (c) ask for help and intervention from elected leadership, Secretary Babbitt, Assistant Secretary Deer, and the Senate Committee on Indian Affairs. We wrote letters, we submitted testimony, we attended meetings, we made phone calls, we did everything humanly possible to be heard. We tell you all this, Senator McCain, and we include copies of our correspondence^①, to show that we saw these problems coming down the road a long time ago, and we were trying to raise awareness a long time ago.

But no one responded to our requests for an Oversight Hearing when steps could have been taken to prevent the looting of the law through regulatory language. Now that the piper must be paid, it is our Nations who have absorbed that cost, and we have paid with tears running down our faces as we watched several years' of hard work, advocacy and trust swept away in the stroke of a bureaucratic pen.

We say again that the present system of consultation does not work, it never has, because a federal agency has only to meet a minimum standard of law that does not provide us with meaningful representation or protection of basic, human rights taken for granted by all other Americans, here in our own homelands! As we told you earlier, the NAGPRA representatives from our tribes are even now preparing an official complaint against the Bureau of Reclamation, which decided to "give" our ancestors' remains excavated from their lands to the Smithsonian Institution. The Smithsonian, moreover, does not have a repatriation deadline, and their Repatriation Office is, even as you read this, conducting expensive, intrusive scientific studies on our ancestors' remains, **without our permission and without consulting us!** Reclamation claims that since it did not have "possession" of the remains, they did not have "control" either, and, **without notifying or consulting our tribes**, relinquished both to the Smithsonian Institution. Reclamation also claims that it has met the minimum standard of the law in consulting our tribes **after the fact**.

We say again that the present process has protected the personal, vested interests of the science and museum industries and this gift was delivered to them on a silver platter by the National Park Service, which was entrusted by Congress to implement its intentions and initiatives to correct a sad and tragic chapter in American history. Not only were we wronged, Senator McCain, but the members of your Committee

① attached copies in chrono order in Appendix.

and other Congressmen who worked hard for and supported this legislation are victims as well.

It is imperative, and we again submit this request, that the Senate Committee begin a dialogue with tribal leadership to review and amend the Administrative Procedures Act to create more direct and meaningful representation of Indian Tribes whenever legislation or regulations are drafted to implement changes which will affect our peoples. As you can see from the serious problems we have shared with you, we require more than a simple advisory role, Senator McCain, we require negotiatory powers, we require oversight, we require intervention and protection. Nothing will change until the system changes.

Please find attached to this section of our response copies of correspondence we have sent over the years regarding our attempts to obtain more meaningful representation, consultation, and resolution to the very problems in the regulations. The only responses we received were from Senators Dorgan, Conrad and Daschle, and, through the efforts of Senator Dorgan, Assistant Secretary Deer's promise not to sign off on the proposed final regulations until after another public comment period was held - a promise she subsequently broke, enabling the regulations to be "hustled" into the final stage.

* Information relative to the individuals involved in this situation is available in the event that it is needed. We refrain from mentioning names in this instance only because we do not wish to create problems for the participants; however, if you require their names to determine the validity of the statement, that information will be provided to you.

Question 3, Page 1, McCain Letter, provide the Committee with a response regarding the development and scope of the final regulations.

Senator McCain, you can see from statements made throughout this document that we have had problems with the development and scope of the final regulations since a proposed draft was published in May of 1993. Problems with development include a near-total absence of tribal participation, input, representation and control. Add to this the NPS' administrative refusal, despite repeated requests from tribes, for another publication and another comment period of proposed regulations. Mix in a dose of the BIA's usual response to pleas of help from tribes, which accounts for Assistant Secretary Deer's decision to sign off on the proposed final regulations even though she'd promised us she wouldn't, and you have a recipe for disaster, and you have our view on the development of the final regulations. That's also where the scope of the final regulations enters the picture.

The damage done to the Act itself, not to mention protections granted to tribes under the Act through the promulgation of these regulations, is enormous in scope. The recent Hawaii ruling is an excellent illustration of how the law has been reinterpreted to benefit the personal, vested interests of the science and museum industries, something we predicted years ago. Reinterpretations have occurred which condone scientific studies not covered in the Act. Reinterpretations of Indian lands, Indian tribes, possession and control, and even a new definition of Native human remains have all resulted in nothing less than major Indian/U.S. policy changes manipulated through the regulatory process.

Irreparable damage has been done to not only the trust relationship Congress is responsible to carry out with Native nations, but to the quality of trust itself in all relationships between our tribes and the federal government, which was not doing that well to begin with. We trusted Congress to provide us with a mechanism which would allow us to bring home our sacred and cultural property, as well as our dead and their belongings, so we could rebury them with dignity, privacy and respect. We trusted the process, which allowed the National Park Service and the NAGPRA Review Committee to promulgate regulations to implement the letter, the intent and the spirit of the law. We trusted the dispute resolution process provided for in the law, which directs us to the courts in the event that informal mediation fails.

As in anything created by human beings, the Act is not perfect, but we are finding that the imperfections and loopholes most heavily affect the needs and interests of Native peoples, and not our opponents, the museum and science industries. As we have said before, the process is replete with problems and pitfalls for Native peoples, and must be corrected to give us a more direct and meaningful role in legislation that directly impacts our peoples.

The process has diverted, negated and eroded the plain meaning of statutory language in matters ranging from tribal lands to the dead bodies of our relatives, our loved ones. We screamed and hollered about the process and the potential scope of the regulations, and no one listened. That's another problem with the process: tribes are not heard. As to dispute

resolutions, a cursory reading of the final regulations will show how, time and time again, tribes are directed to the courts to find relief for every single dispute with museums and federal agencies! We are poor, and cannot afford to litigate every time a museum decides it does not have to return our dead or our sacred and cultural property.

Moreover, the recent Hawaii ruling very clearly illustrates ambiguities and loopholes in the law that protect the interests of the science and museum industries, and not Native peoples'. So you see, Senator, the development and scope of the final regulations have had the effect of preventing tribes' from enjoying the full benefits intended by Congress when the law was passed in 1990. **We maintain that the deck was stacked against us from the beginning, and the results of playing with a stacked deck are there for you to see in the final regulations, which are of little use but great harm to our tribes as we attempt to implement the original intentions of the Native American Graves Protection and Repatriation Act.**

ANSWERS TO THE QUESTIONS DEALING WITH THE HAWAII RULING

QUESTION 1, Page 2, McCain Letter, part (a) whether NAGPRA inventory information should be subject to public disclosure.

As we discussed earlier in this document, Senator McCain, our tribes do not feel that NAGPRA inventory information, dealing as it does with human remains and burial belongings, should be subject to public disclosure. Letters can be sent to those tribes who may have an interest in a particular claim, but when regional coalitions can be organized, we will be reaching agreement about these remains ourselves, thus resolving any potential claim disputes. We are particularly concerned, Senator, about certain unscrupulous individuals who have already approached our tribes and enrolled members about selling (for amounts in the hundreds of thousands of dollars) certain artifacts and sacred objects. Publications of inventories or repatriation activities are already being utilized by these individuals to locate these artifacts and other objects, and to our knowledge, one war shirt and a very special sacred pipe, both of great spiritual and emotional value, have been sold overseas to unknown collectors. In order to prevent exploitation of this type from occurring again, publication of this information must be restricted to general information and supplemented with letters to official NAGPRA representatives of other tribes who may have a demonstrable interest. Moreover, it is our great desire to accord our ancestors the highest degree of dignity in a situation where a basic human dignity has been denied them for many years; it will be extremely difficult to bring our relatives home in a private and dignified manner when the news surrounding their repatriation and pending reburial has been shouted from the rooftops. We do not feel that our requirement of privacy and respectful treatment of our people and our ancestors is unreasonable. To that end, our tribes offer our assistance in the development of any proposed amendment to the Act to facilitate an exemption for this information under the Freedom of Information Act.

QUESTION 1, Part (b), whether Congress should act to amend NAGPRA to provide protection from public disclosure of information derived from NAGPRA inventories.

The North Dakota tribes feel very strongly that Congress should act to amend NAGPRA in this and other matters relating to the confidential treatment of information contained not only in inventories, but also relating to items of sacred and perhaps even cultural patrimony. History serves us in this matter, since it illustrates very clearly what happens when Native spiritual and cultural values are ignored, even though knowledge of them is available to the general public: our oral history, ceremonies, stories and even our graves were unabashedly "mined" by the science and academia, and even by the citizenry. The very safety and security of reburial sites depends on Congress acting now to provide restrictions regarding public disclosure. Now, more than ever, we require a little privacy, a little respect, as we work to restore to our ancestors the self-evident, human right to rest in peace and dignity. **Definite steps should now be taken by Congress to protect the privacy of our tribes and our ancestors, and NAGPRA should be amended to exempt all repatriation information from public disclosure, particularly since a district judge has just decided for us that our ancestors have no rights, not even the**

right to rest in peace and privacy enjoyed by all others who now live in our homelands, and that we, as their descendants, have no rights to basic privacy, human decency and respect for our spiritual values and beliefs.

Since the Hawaii ruling raises problems which were not anticipated when the law was enacted, such as ensuring the right of privacy and respectful treatment for Native peoples as they repatriate and rebury their ancestors' human remains and personal burial belongings, it affords us the opportunity to consider other matters of confidentiality as well. It is our hope that the Committee can easily see how privacy is required in the repatriation of sacred and cultural patrimony as well, beginning with the sacred knowledge tribes are required to share in order to identify and claim our sacred and cultural patrimony, and ending with the desire to repatriate and rebury our relatives with respectful privacy, thus ensuring the safety and sanctity of all reburial sites. As we mentioned earlier, Native peoples are just as vulnerable now as they were in historical times when they were preyed upon by roving ethnologists, anthropologists and archeologists, who, convinced we were going to vanish from the face of the earth, advanced upon our peoples with greedy eyes and amassed huge collections in the process. The problem today is only slightly different, since we are now assailed by collectors of a different sort - the kind who want to sell our sacred and cultural patrimony overseas and who accomplish their aim by dangling large sums of money before the eyes of vulnerable, impoverished tribal members who can claim a lineal descent to famous political and spiritual ancestors.

Particularly in light of the fact that the ruling will not be appealed, we say again that Congress must act now to protect the privacy and dignity of our ancestors, our elders and spiritual leaders, and our entire Nations as we work to bring our sad task of reburial and repatriation to a close. Things are painful enough; we should not have to endure all of America watching over our shoulders as we rebury our dead: we will have to feed them, we will have to cry for them, and apologize to them for the way they have been treated - we will need privacy and, finally, respect from the society that did this to them. Is this so much to ask? We don't think so.

QUESTION #1, part (c), whether protection from public disclosure of information derived from NAGPRA inventories should be limited in scope, and if so, in what respect?

Senator McCain, as you have gathered from statements elsewhere in this document, our tribes believe that protection from public disclosure of all repatriation information should be very broad in scope, if all the problems associated with lack of confidentiality are going to be addressed. We tribes urgently require the highest level of privacy if we are going to ensure a dignified, peaceful and respectful return of our ancestral human remains, sacred property and even items of cultural patrimony. It should not be left even to Congress to decide how much, if any, privacy the tribes will require. That decision should be left to the individual tribes themselves, as this is a decision we are entirely capable of making for ourselves. Outcomes of our decisions will vary, depending upon the spiritual and cultural values maintained by the various Nations regarding this type of information. To some, like our Nations in the Northern Plains, this is an extremely sensitive subject, but we have

learned that other tribes have allowed news programs to cover reburial and other types of ceremonies, indeed one tribe has produced their own video of a repatriation and reburial ceremony. You can see, then, that our diverse cultures and value systems will require the flexibility of being able to make all decisions about confidentiality for ourselves, and since such a wide range is required to allow for this, nothing less than complete protection of all repatriation records, materials and other information is required.

QUESTION #1, part (d), whether NAGPRA inventory information should be exempted from the application of the Freedom of Information Act.

Once again, Senator, elsewhere in this document our tribes have maintained that **complete exemption of all repatriation information**, including NAGPRA inventories, is absolutely required under the Freedom of Information Act. Nothing less will suffice, in our view.

QUESTION 2, Page 2, McCain Letter, part (a), whether NAGPRA sufficiently addresses the issue of necessary scientific studies which may be initiated during the course of compiling and inventory to comply with NAGPRA.

Senator McCain, we are so glad you asked us to respond to all of the questions you sent us, but we are particularly glad you asked **this** question. You see, Senator, our tribes have had problems with this area of NAGPRA since we saw the first draft of legislation, and called attention to our issues with it right from the beginning. We felt, and continue to feel, that the law's use of the word "study" was **very ambiguous, particularly where it concerned activities related to the compilation of inventories**. Our tribes have negotiated our way through a number of exit inventories at both the state and federal agency levels, and in our experience the area of "inventorying" the remains of our relatives appears to be the last bastion of hope for the science and museum industries who desperately want to use "exit inventories" of our ancestors' remains to conduct one last scientific examination of our relatives, with or without our permission, because they, too, see the ambiguity in the law and hope to take advantage of it.

Way back in 1988, we were calling for clear and concise language describing precisely what museums and federal agencies were allowed or not allowed to do during an "exit inventory" of our ancestors' remains. We were told, however, that it was at our urging that language was included to state that the Act was not to be construed as an authorization of new scientific studies, and contented ourselves with that section of the law. It has been, however, our direct experience that many, many federal agencies and museums ignored this directive and subjected most, if not all, remains in their control or possession to rigorous, state-of-the-art scientific study, under the guise of compiling their inventories. The Bureau of Reclamation, for instance, without notification or consultation of our tribes, informed us that they developed an Inventory Plan (30+ pages), to be used agency-wide, which calls for, among other things, radiography of our relatives' bones. Radiography is a procedure which requires that the bones be coated with a radioactive liquid substance before photographing them with a special film. **Our tribes, over ten years ago, officially took the position that we were categorically opposed to any type of "study" of our relatives' remains and personal burial property. We are opposed to photography, never mind radiography!**

Our permission was never sought to conduct this or any other type of study on our relatives, and had it been, it would never have been granted. Indeed, our tribes knew nothing of Reclamation's inventory activities until well after the fact. Please find attached a copy of their Inventory Plan, which was presented to our tribes' NAGPRA representatives on September of 1995 by Reclamation, where you can see for yourselves the level of study which has already been carried out under the cloak of conducting an "inventory" and discovering "cultural affiliation" of our ancestors' remains. **Senator McCain, please take careful note of what we are going to tell you now: There is not now, nor has there ever been, a single scientific test method available which will conclusively identify a set of Native human remains as to tribal origin. In our view,**

and in the official position our tribes have long held on this matter, all such determinations are based on conjecture and are speculative in nature.

Moreover, had the science and museum industries treated our ancestors' remains with the barest of professional standards, they would now be able to examine existing records and data to determine, to the best of their ability, the tribal affiliation of our ancestors' remains. This, as you know, however, has not been the case, as our ancestors' remains and personal burial belongings have been casually and sloppily stored in hallways, closets, in brown paper grocery bags and feminine hygiene product boxes (one tribe was actually given repatriated remains in this type of container by a state agency!), placed on public display with no scientific or educational information - just for the sheer thrill (and some-times for a price) of public viewing of dead Native people; loaned to colleagues and museums half-way around the world and totally forgotten about until someone had to go looking for them to complete their inventories; and generally stashed away in thousands of dusty storage rooms and university labs all over the country. Many of our ancestors were simply packed up and shipped to historical societies, museums and federal agencies by everyday citizens, who came across them in farming and other activities and "donated" our relatives' bodies to repositories as "curiosities." **All without our peoples' knowledge or permission.**

One federal agency that we know of, but probably others as well, has used the NAGPRA inventory process to "give away" some of our ancestors who were excavated from their lands - again, the Bureau of Reclamation. We were not informed of this "inventory" decision until well after the fact, we were not notified, we were not consulted and so had no opportunity to protect our relatives' remains from the clutches of the Smithsonian Institution, who claimed "ownership" of the remains by virtue of having had "possession" of them since they were excavated in the 1940's. Our hearts feel heavy and sad when we think of the intrusive scientific analysis that is probably being aggressively conducted on our relatives by the Smithsonian as you read these words.

The point we are trying to make, of course, is that our relatives' earthly remains and personal burial property have NEVER been treated respectfully or even professionally by the science and museum industries, indeed society in general, to the point that anyone even cared sufficiently about them to adequately document and store their bodies once they had been yanked from their graves. It was only when Native people discovered this deplorable situation and rose to stop the racist practice of the robbery and study of our graves was the "loss" to science loudly and arrogantly lamented. Amid great gnashing of teeth, *the rush was on* to study, document, analyze and further desecrate our relatives before precious "scientific and cultural materials" could be "destroyed" through reburial.

In our view, the science and museum industries have only themselves to blame that they did not correctly catalog and store our dead relatives while they had them, and should not now be allowed to gather one more iota of data from our relatives under the cloak of conducting NAGPRA inventories. We said this back in 1988 and we are

still here to say it again, all these years later! It is, in most cases however, too late - the damage has been done and so has the scientific analysis. Our tribes know personally many members of the science and museum industries who would chuckle smugly at hearing us utter that last sentence, and we don't mind telling you, Senator, that thought fills us with pain and sorrow.

We suspected that this was happening all along, of course, and more or less knew scientific study and analysis was surreptitiously conducted under the guise of inventorying, but due to the secrecy and failure of federal agencies and museums to notify and consult with tribes as inventories were initiated and compiled, we had no evidence until well after the fact, and so, what could we do? **It is our strong view that NAGPRA should be amended to fine all federal agencies and museums who conducted this racist, ethnocentric study without the notification or permission of the descendants of our ancestors, and they should be made to turn over to tribes all documents and data gathered from these studies to prevent them from ever benefiting from this ill-gotten information.** Apparently, this type of redress is what Hui Ma Lama was attempting to obtain with their lawsuit; we wish to state here for the record that we are in complete agreement with their intentions, and would have ourselves brought suit if we had the financial resources to do so. It is unfortunate that the judge in this case issued such a narrow and ill-informed decision, more unfortunate still that the decision will not be appealed. **Due to that fact, Senator McCain, it is more imperative than ever that NAGPRA be amended to address all of the issues raised in the Hawaii ruling, and utterly critical that Native peoples be allowed a greater and more meaningful voice during all deliberations about amendments to the law.**

QUESTION 2, Page 2, McCain Letter, part (b), whether the Definitions section of NAGPRA should be amended to include definitions of "inventory," "scientific studies," and "scientific information."

As we said earlier, Senator, our tribes argued for this clarification years ago when the legislation was still being discussed by Congress. We not only believe very strongly that definitions of these words are needed still today, we offer you the following proposed definitions, which our tribes have already used in agreements concerning existing collections with state and federal agencies. They have worked extremely well and would completely protect our position (and that of other tribes') on study or scientific analysis if amended into the law:

INVENTORY - shall mean the physical creation of (a) a listing of the contents of containers storing human remains and/or personal burial belongings and (2) other existing records.

SCIENTIFIC STUDY - shall mean any activity requiring the human remains or personal burial belongings to be touched by anyone other than a tribal spiritual leader.

SCIENTIFIC INFORMATION - shall include, but not be limited to, any data, records, photographs, radiographs, plaster castings, measurements, weights, recorded audio or video tapes, books, articles, essays, monographs, bulletins, test findings or results, or professional scientific papers of any sort.

QUESTION 2, Page 2, McCain Letter, part (c), would further scientific studies, either during the course of compilation of an inventory or after the conclusion of such an inventory, be warranted?

Senator, based upon the official position taken by our North Dakota tribes, and based upon all the foregoing statements in this document, our answer is short and unequivocal: **ABSOLUTELY NOT**. You see, based upon our spiritual beliefs, when the scientists and others robbed their graves, our relatives were yanked out of the Spirit World, too - we have seen them, where they're at, and they are pitiful, crying and lost. They wander between this world and theirs, and they whirl above the places where their bodies are kept, and they whirl above all of us, too, trying to get our attention so we can help them. The fact that they are around us, restless and agitated, affects us, too, and our people have suffered and endured too many tragedies to prolong the suffering by allowing any further racist, ethnocentric study of our poor Old Ones. **Our ancestors and our people have suffered enough, and, understandably, we just want it to stop.**

Moreover, we have never benefited from these racist studies, and contend that the only ones who gain are the ones who conduct them, but even these members of the science and museum industries must be pitied, for their gain is only temporary and they must one day go home to the Spirit World, too, and there they will encounter those they have violated in their days upon this Earth. They are, indeed, to be pitied then.

QUESTION 3, Page 2, McCain Letter - should the Congress amend the Act to provide authority for legal actions to be brought by those who may qualify to serve as guardians on behalf of Native human remains?

Again, Senator, because of our official positions on all NAGPRA-related matters, as well as all of our foregoing statements regarding problems we have encountered, our answer must be short and unequivocal: **ABSOLUTELY YES**. An amendment of this kind will provide immeasurable relief to Native people, in addition to critically necessary legal standing for tribes as they meet with all kinds of resistance from the science and museum industries, who must hate the thought of giving up any of their treasures, and who will obviously subject themselves to new lows to keep whatever they can. An amendment of this nature will empower all Native peoples as they struggle to make NAGPRA do what Congress intended it to do, it will be like rain to a parched desert: finally, *finally* comfort and succor! **We cannot stress strongly enough, particularly in light of the recent court ruling in Hawaii, how critically urgent it is for Congress to enact this type of amendment to the NAGPRA.**

CHAIRMAN
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SECRETARY
Arlene Thompson
TREASURER
Benita Clark
VICE-CHAIRMAN
Lanny LaPlante



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December 19, 1995

The Honorable Senator John McCain
Senate Committee on Indian Affairs
United States Senate
Washington, DC 20510

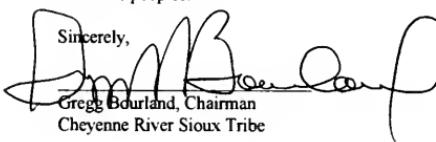
Dear Sir,

I am submitting to you and to the Committee on Indian Affairs, for review and consideration, the following comments drafted by my tribe regarding the final rule of regulations for implementing the Native American Graves Protection and Repatriation Act; PL-101-601. Attached, please find five pages of commentary that detail our concerns that we have as Native American people, who regard with trepidation, just how poorly that the regulations for NAGPRA, interpret and implement the statutory language.

I would also submit to you on behalf of the Cheyenne River Sioux Tribe of Indians. That we the Lakota people of the Cheyenne River Sioux Tribe, believe that the process of promulgating the regulations that was undertaken by the National Park Service, has totally failed to adequately support and advocate the Indian peoples right to repatriate without hindrance, our ancestors and their cultural items that have been stolen from our lands by profiteering peoples seeking to achieve capitol gain at our expense.

As Chairman of the Cheyenne River Sioux Tribe of Indians, I submit that the Indian people have not been allowed to fully participate in this promulgation process. And that our concerns for our ancestors have been shoved aside and disregarded by those who were given the authority and directive to write the regulatory language that should protect our rights and the rights of our deceased ancestors who have been held in captivity for so many years.

I respectfully request that you review the commentary submitted by the Cheyenne River Sioux Tribe and take action towards addressing our concerns. And I pray that when you complete your review, that yourself, can begin to understand our view of this situation and take whatever necessary steps that must be taken to address our concerns and right the wrongs that have been perpetrated upon all the Indian people by the drafters of the regulations, who have weakened our legal standing in using the law to repatriate our ancestors and our birth right as Native peoples.


Sincerely,
Gregg Bourland, Chairman
Cheyenne River Sioux Tribe

TRIBAL COUNCIL MEMBERS

DISTRICT 1
Raymond Uses The Knife Jr.
Vernon Mestes

DISTRICT 2
Ted Knife Sr.

DISTRICT 3
Maynard Dupris
Ed Widow

DISTRICT 4
Robert Lofton Sr.
Gilbert Red Dog Sr.
Orville LaPlante
Arie High Elk

DISTRICT 5
Marlin Miner Sr.
Sam Annis
Robert Chasing Hawk
Lanny LaPlante

DISTRICT 6
Joan LeBeau
Louis DuBray

The blue represents the thunder clouds above the world where live the thunder birds who control the four winds. The rainbow is for the Cheyenne River Sioux People who are keepers of the Most Sacred Calf Pipe, a gift from the White Buffalo Calf Mender. The eagle feathers at the edges of the rim of the world represent the spotted eagle who is the protector of all Lakota. The two pipes fused together are for unity. One pipe is for the Lakota, the other for all the other Indian Nations. The yellow hoops represent the Sacred Hoop, which shall not be broken. The Sacred Calf Pipe Bundle in red represents Wakan Tanka—the Great Mystery. All the colors of the Lakota are visible. The red, yellow, black and white represent the four major races. The blue is for heaven and the green for Mother Earth.

Section 10.2 Definitions

(b)(1) *Lineal descendant* - Although this clause acknowledges the right to determine descent by means of the traditional kinship system of the appropriate Indian tribe. In the form in which it has been written in the regulatory language,

"means an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descent to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations."

The clause as written does not "specify" nor "mandate" that the applicable legal law to determine kinship regarding the demonstration of Native American descent to a known Native American individual should be the "tribal law" of the appropriate Indian tribe. The phrase, *or by the common law system of descent*, is ambiguous and can be inferred to mean that federal agencies and/or museums can "choose" to recognize or not recognize tribal law regarding traditional kinship relationships as acknowledged and supported by the governing Indian tribe to which the lineal descendant is an enrolled member thereof

(b)(2) *Indian tribe* - as written, this clause with the concluding sentence *The Secretary will distribute a list of Indian tribes for the purposes of carrying out this statute through the Departmental Consulting Archaeologist*. Implies that only those Indian tribes with federal recognition are eligible for making repatriation claims to federal agencies and/or museums. The phrase in the proceeding sentence: *which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*. Is ambiguous towards understanding if, the clause is referencing Native American ethnic groups which do not have federal recognition as Indian tribes

(d)(1) *Human remains* - although the clause appears to adequately define human remains. It should incorporate within its language a statement that specifies it is the right and privilege of any Indian tribe to define within the context of its own cultural reckoning, what it is as an Indian tribe, considers a human remain to be for the purposes of repatriation.

(d)(3) *Sacred objects* - this clause needs to "specifically" state:

The appropriate Indian tribe seeking to repatriate objects from a federal agency and/or museum, shall be the sole authority to identify and define what objects in the control of a federal agency and/or museum are "SACRED" to that and only that particular cultural group which is making the repatriation request. The determination of what object is and/or is not considered a sacred object rests solely and exclusively upon the decision of the repatriating Indian tribe.

Secondly as written, the clause hinders the repatriation of sacred objects by Indian tribes because of the usage of the words - ***specific - needed*** - contained within the first sentence of the clause. Due to the diversity of how different and shared cultural groups worshiped the creator where the individual belonging to the cultural group was allowed to acknowledge and supplicate themselves to a higher supernatural authority according to their own understanding of how expressing one's spirituality should be undertaken. And acknowledging that different and shared cultural groups of people allowed for the establishment of male/female Societies that were also allowed to acknowledge and supplicate themselves to a higher supernatural authority according to their own understanding of how expressing one's spirituality should be undertaken. This clause needs to acknowledge this occurrence and state that within the different and shared cultural groups where such activities have taken place but may or may not have been recorded or noted within the historical record pertaining to Indian tribes and people, consideration of such real occurrences must be given redress

Through the incorporation of the language written above in bold and italic Such wording as has been provided for review empowers Indian tribes to demonstrate their right for self-determination regarding what is or is not a sacred object And it empowers the Indian tribe to address within it's own cultural reckoning, the diversity of spiritual expression of it's membership

(4)(e) *What is cultural affiliation?* - in using the term, *“expert opinion.”* Expert opinion without definition enables non-Indians to seek out, authorize, and utilize other non-Indians as experts who can interpret tribal history and traditional cultural mores, activities, and spiritual beliefs of a people to whom they have no shared ethnicity with. The term must either be dropped from the clause, or, it must be defined to state that expert opinion means *Oral testimony of traditional tribal elders of the Indian tribe submitting the repatriation request.*

Section 10.3 Intentional archeological excavations

(b)(1) *Specific Requirements* - regarding the sentence

Regarding private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs (BIA) will serve as the issuing agency for any permits required under the Act.

It needs to be stated that Indian tribes as governments with the authority to regulate activities on their reservations. Have the right to assume and/or replace the regulatory authority of the Bureau of Indian Affairs if they so choose too do so. The applicable law for regulation of archeological excavations undertaken within the exterior boundaries of a Indian reservation is tribal law.

Section 10.4 Inadvertent discoveries

This section as in Section 10.3 needs to state that within the boundaries of a Indian reservation the applicable law regarding the regulation of managing inadvertent discoveries is tribal law.

Section 10.5 Consultation

(a)(1) *Consulting parties* - the term “*aboriginal lands*” in the sentence:

from Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made;

This sentence needs to be expanded to read *aboriginal lands as defined by the oral history of the tribe that claims occupation and/or interest in the territory where - the planned activity will occur or where the inadvertent discovery has been made;*

(a)(3) - this clause is ambiguous and it does not explain what demonstrates a cultural relationship. As written the clause is workable, however, unless the agent seeking tribal consultation has prior knowledge of all of the Indian people who through their oral tradition claim occupancy or interest in the lands where the discovery is made. Indian tribes may not receive proper notice of discovery and consultation inquiry.

Section 10.6 Custody

(a)(2)(iii) - this clause does not empower Indian tribes to invoke “*Oral History*” as a method of determining what is considered a Indian tribes aboriginal lands as they are defined by the oral history of the tribe itself. To address this clause and correct the oversight the following phrase needs inclusion after, *as the aboriginal land of an Indian tribe and/or where the Indian tribe has within it's oral history, references where this territory was and is considered a part of it's aboriginal lands:*

Section 10.7 Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony. [Reserved]

It is inexcusable that this section of regulation has not been promulgated for review and comment. Regulations for this section need to be publicly proposed and commented upon by Indian tribes and tribal participation in the development of this regulation must be mandated upon the federal agency charged with drafting the proposal. Tribal participation is defined as, Indian tribes help to “*write*” this section and not just submit comments for review upon the proposed draft of the language.

Section 10.10 Repatriation

(c)(1) *Exceptions* - this clause as written does not specify that federal agencies and/or museums in control of human remains, funerary objects, sacred objects, or objects of cultural patrimony, are prohibited from automatically declaring that their entire collections are collections of “*scientific study*” simply because they would desire to do so and thus prevent any repatriation from taking place. Secondly the clause does not mandate that the federal agencies and/or museums must “*prove*” to Indian tribes that a scientific study is currently being conducted. It also does not state that a federal agency and/or museum cannot begin a study simply to prevent repatriation from taking place. And lastly, the clause does not address at all or even considers that Indian tribes and their members often

have strict spiritual taboo's that prohibit the scientific study of these items. To address and correct this oversight, language needs to be included where a federal agency and/or museum is mandated to first request and receive tribal permission to conduct a scientific study on any item in their collection since the enactment of this law

Section 10.11 Disposition of culturally unidentifiable human remains [Reserved]

It is inexcusable that this section of regulation has not been promulgated for review and comment as well. Regulations for this section need to be publicly proposed and commented upon by Indian tribes and tribal participation in the development of this regulation must be mandated upon the federal agency charged with drafting the proposal. Tribal participation is defined as, Indian tribes help to "write" this section and not just submit comments for review upon the proposed draft of the language.

Section 10.12 Civil penalties [Reserved]

Once more it is inexcusable that this section of regulation has not been promulgated for review and comment as well. Regulations for this section need to be publicly proposed and commented upon by Indian tribes and tribal participation in the development of this regulation must be mandated upon the federal agency charged with drafting the proposal. Tribal participation is defined as, Indian tribes help to "write" this section and not just submit comments for review upon the proposed draft of the language. Secondly under this section, the rules for the levying of civil penalties for non-compliance by a federal agency and/or museum with the law must be "*strict*," "*harsh*," and "*immediate*." No federal agency and/or museum that is discovered to be in non-compliance with law cannot escape full prosecution under the law

↓

Section 10.13 Future applicability [Reserved]

Again, it is inexcusable that this section of regulation has not been promulgated for review and comment. Regulations for this section need to be publicly proposed and commented upon by Indian tribes and tribal participation in the development of this regulation must be mandated upon the federal agency charged with drafting the proposal. Tribal participation is defined as, Indian tribes help to "write" this section and not just submit comments for review upon the proposed draft of the language.

Section 10.14 Lineal descent and cultural affiliation

(b) *Criteria for determining lineal descent* - the applicable law in this criteria is tribal law, and only tribal law. It must be specifically stated that all Indian tribes have the right, the responsibility, and the duty to invoke their own legal definitions of determining kinship relationships for their cultural group. As in Section 10.2, this clause as written does not "*specify*" nor "*mandate*" that the applicable legal law to determine kinship regarding the demonstration of Native American descent to a known Native American individual should be the "*tribal law*" of the appropriate Indian tribe. The phrase; *or by the common law system of descent*, is ambiguous and can be inferred to mean that federal agencies and/or museums can "*choose*" to recognize or not recognize tribal law regarding traditional

kinship relationships as acknowledged and supported by the governing Indian tribe to which the lineal descendant is a enrolled member thereof.

(3)(e) *Evidence* - using the phrase “*expert opinion*.” Expert opinion without definition enables non-Indians to seek out, authorize, and utilize other non-Indians as experts who can interpret tribal history and traditional cultural mores, activities, and spiritual beliefs of a people to whom they have no shared ethnicity with. The term must either be dropped from the clause, or, it must be defined to state that expert opinion means *Oral testimony of traditional tribal elders of the Indian tribe submitting the repatriation request*.

Section 10.15 repatriation limitations and remedies

(b) *Failure to claim where no repatriation or disposition has occurred.* **[Reserved]** - Once again we reiterate that regulations for this section need to be publicly proposed and commented upon by Indian tribes and tribal participation in the development of this regulation must be mandated upon the federal agency charged with drafting the proposal. Tribal participation is defined as, Indian tribes help to “*write*” this section and not just submit comments for review upon the proposed draft of the language

- also in this section we see in the construction in the first sentence where the words *repatriation or disposition* have been put together. That it appears that disposition of human remains, funeral objects, sacred objects, or objects of cultural patrimony has become a condition of repatriation and this gives the impression that federal agencies and/or museums may legally refuse to repatriate such items unless they have a say in determining how the disposition of such items are handled by the Indian tribe. This cannot be allowed to stand since disposition is solely within the provenance of the Indian tribe to determine. Another example of poor judgement in sentence construction can be found in (d)(1)(ii) where it reads *disposition of or control over*, can be implied to mean that federal agencies and/or museums can prevent repatriation unless they have a determining say in how such items will be handled by the Indian tribe

Section 10.17 Dispute resolution

(a) *Formal and informal resolutions* - with regards to the phrase *with respect to the repatriation and disposition of*, we once more point out that disposition as read within this sentence has become a condition of repatriation and this gives the impression that federal agencies and/or museums may legally refuse to repatriate such items unless they have a say in determining how the disposition of such items are handled by the Indian tribe. This cannot be allowed to stand since disposition is solely within the provenance of the Indian tribe to determine.

These are the comments submitted for the record by the Cheyenne River Sioux Tribe of Indians in the State of South Dakota regarding the Final Rule 43 CFR Part 10, the Native American Graves Protection and Repatriation Act.



Yankton Sioux Tribe

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 FAX (605) 384-5687

December 18, 1995

Senator John McCain, Chair
 Senate Committee on Indian Affairs
 Russell Senate Office Building
 Washington, DC 20510

Dear Senator McCain

We write to express our concerns with the drafting of the Native American Graves Protection and Repatriation Act (NAGPRA) Regulations as published in the Federal Register dated December 4, 1995. In addition we make three requests that we hope will serve to rectify the problems encountered in the process

First, by the time tribes/bands receive notification of newly proposed rules, and that we have opportunity to comment, the deadline is nearly upon us. It leaves very little room for tribal participation. Thus, laws originally intended to protect the interests of tribes become shaped by the comments of non-Indians. In the case of NAGPRA, the museums/institutions holding Native American remains and objects have shifted the Act to protect their interests in the December 4, Final Rule (referenced above). As a result, tribes are now required to furnish more documentation and proof for the return of items that clearly do not belong in institutions.

Please consider extending the committee's December 20, 1995 deadline for further comment so that more tribes/bands can be heard. Secondly, we ask your committee to declare the present NAGPRA Regulations, Final Rule, to be invalid in order for tribes/bands to have adequate input in the drafting of the final regulations. Further, in the future, consider that tribes need to receive invitations for comment with ample time to prepare and forward comments to the committee. Thank you for your time and attention.

Sincerely,



Darrell E. Drapeau, Chairman
 Business and Claims Committee
 Yankton Sioux Tribe

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Business and Claims Committee YST

MEMBERS
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 ROBERT "PETE" KEZENA
 MAXINE ROUSE

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 30, 1996

The Honorable John McCain
Chairman, Senate Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter of November 30, 1995, concerning the Native American Graves Protection and Repatriation Act (NAGPRA). NAGPRA and the Archeological Resources Protection Act (ARPA) provide the tools to deter destruction of burial sites and archeological and cultural resources, resources which constitute an irreplaceable part of our heritage. The protection of historical and archaeological resources involves more than the preservation of artifacts, burial sites, battlefields, and other tangible items. These statutes protect the values, beliefs, aspirations, religious practices, and identity of Indian peoples and of this Nation. The Department of Justice is committed to providing the resources and training necessary for vigorous enforcement of NAGPRA and ARPA.

Your letter requests specific information regarding the Department's policies, guidelines, training activities, and prosecutions pursuant to the portion of NAGPRA codified as the Illegal Trafficking in Native American Human Remains and Cultural Items Act, 18 U.S.C. § 1170. I turn now to those questions.

1) **What policies and guidelines have been issued within the Department of Justice for the enforcement of 18 U.S.C. 1170, Illegal Trafficking in Native American Human Remains and Cultural Items Act?**

Federal prosecution pursuant to 18 U.S.C. 1170, as well as ARPA and other criminal provisions which can be used to prosecute archeological resource violations, such as the theft of government property statute, 18 U.S.C. 641, and the depredation of government property statute, 18 U.S.C. 1361, is pursued by the United States Attorneys' Offices. Legal assistance is provided by attorneys of the Executive Office for U.S. Attorneys and the Criminal Division of the Department, if such assistance is requested.

A paramount interest of the Department of Justice is ensuring that there are sufficient Assistant United States Attorneys located throughout the country who are versed in the various technical requirements of NAGPRA and other statutes designed to protect burial sites and cultural resources. To this end, the Criminal Division, in conjunction with the Department of the Interior's Archeological Assistance Division and other members of the Federal Interagency Archeological Protection Working Group, have prepared a two-volume publication entitled "Archeological Resources Protection: Federal Prosecution Sourcebook."

The Sourcebook has been distributed to all 94 United States Attorneys Offices. In addition, the Archeological Assistance Division has distributed the Sourcebook to a wide variety of agency attorneys, land managers, archaeologists, criminal investigators, and Indian tribal leaders. This Sourcebook, which is supplemented periodically, is a valuable training tool which educates its users and promotes NAGPRA and ARPA prosecutions.

In addition the Department co-sponsors, in association with the Archeological Assistance Division, an annual conference entitled an "Overview of Archeological Protection Law." This conference has provided intensive training to numerous Assistant United States Attorneys in addition to a number of agency personnel and other individuals involved in the preservation of our rich archeological heritage.

While the Department has issued no formal policies or guidelines, the Sourcebook contains some materials relating to the enforcement of 18 U.S.C 1170.

2) What is the approximate number of reports received and investigations made of alleged violations of 18 U.S.C. 1170?

Historically, almost all criminal ARPA and NAGPRA offenses have been investigated by agents and archaeologists employed by the federal agency which has responsibility over the land on which the unlawful excavation and removal occurred, with the Federal Bureau of Investigation being called in to assist, if requested, where no federal land managing agency has jurisdiction. The Department does not maintain comprehensive records of the number of investigations under 18 U.S.C. 1170 by other federal agencies.

Following investigation and referral to the Department, further investigation and federal prosecution is pursued by the United States Attorneys' Offices, with legal assistance provided, if requested, by attorneys of the Criminal Division of the Department of Justice. Since the enactment of NAGPRA in November 1990, the Department has received criminal referrals identifying

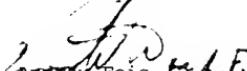
46 suspects with possible violation of 18 U.S.C. 1170. Criminal charges were brought against 13 of the suspects.¹ Ten of the suspects are still under investigation. The referrals against the 23 remaining suspects were closed for one of the following reasons: lack of evidence or criminal intent; weak or insufficient evidence; suspect to be prosecuted by another authority; no federal offense committed; completion of pre-trial diversion; suspect cooperation; and guilty plea entered in Magistrate Court.

3) What is the approximate number and disposition of pending and completed cases charged under section 1170 of title 18?

Since the enactment of NAGPRA in November 1990, criminal charges have been filed against 13 defendants. There has been a final disposition of nine of these defendants. Six of the defendants entered guilty pleas, two were dismissed without prejudice, and one dismissed with prejudice. Cases filed against four defendants are still pending in federal district court.

If the Department can be of further assistance, do not hesitate to contact my office.

Sincerely


Andrew Fois
Assistant Attorney General

CC: The Honorable Daniel Inouye, Vice Chair

¹ All numbers contained in this letter are based on Department records as of September 30, 1995.



SMITHSONIAN INSTITUTION

Washington, D.C. 20560
U.S.A.

January 26, 1996

Honorable John McCain
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As a follow up to your Oversight hearing on the Native American Graves Protection and Repatriation Act (NAGPRA) and preliminary discussions with the Committee staff, I would like to submit some materials for the record.

Enclosed you will find the National Museum of the American Indian Repatriation Policy and the National Museum of Natural History Repatriation Guidelines, both of which establish that the Smithsonian is complying with the spirit of NAGPRA in virtually every respect.

The National Museum of the American Indian has prepared and distributed the combined summaries and inventories of the entire collection to all federally recognized tribes. The first mailing was completed in November, 1993, and the inventories were supplemented in November, 1995 through an additional mailing. Extensive repatriation activity has been taking place also, as you can see from the information submitted with this letter.

The National Museum of Natural History (NMNH), has adopted the categories of objects eligible for repatriation and certain procedures and definitions contained under NAGPRA. In addition, the Repatriation Office is complying fully with the National Museum of the American Indian Act and is working on a substantial repatriation caseload. With respect to many of these cases, tribes have been given timetables for completion of their respective requests.

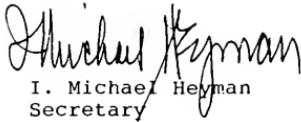
Due to the significant volume of pending repatriation requests, the staff of the Repatriation Office has devoted its resources to completing these cases and repatriating eligible materials. These cases are extremely time-consuming, and we are providing you with a sample case report, which illustrates the time, effort, and research involved with each repatriation request.

Senator McCain
Page two

Moreover, because the National Museum of the American Indian Act deals specifically with repatriation and does not prescribe deadlines for the completion of an inventory, the Museum's priority has been on the former and not the latter. Although the Smithsonian understands the importance of completing an inventory and is preparing a timetable and budget plan to submit for the Committee's consideration, it is important to note the difficulties posed by limited resources of maintaining current agreements and timelines with tribal repatriation requests while concurrently completing an accurate inventory. We are committed to accomplishing both and look forward to working with you on preparing the most responsible and feasible approach. I will be back to you shortly with a schedule for completion of the inventory and a budget plan within existing resources.

Finally, I am enclosing a letter from the National Museum of Natural History which clarifies some misconceptions presented by outside witnesses about the Smithsonian and its collections. I hope this information will be helpful as the Committee deliberates on the implementation of the NAGPRA Act. We are ready and willing to offer any additional assistance that you may request on this subject.

Sincerely,



The signature is handwritten in black ink, appearing to read "I. Michael Heyman".

I. Michael Heyman
Secretary

Enclosures



**NATIONAL MUSEUM of
NATURAL HISTORY**

SMITHSONIAN INSTITUTION

January 22, 1996

Honorable John McCain
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator McCain,

This letter provides additional comments for the record on the repatriation program at the National Museum of Natural History (NMNH). These comments follow up on testimony given during the recent oversight hearing for the Native American Graves Protection and Repatriation Act (NAGPRA) held by the Select Committee on Indian Affairs. Unfortunately, the Smithsonian was not included in the witness list and therefore did not have the opportunity to provide information or expound upon the many accomplishments the Natural History Museum has made in the area of repatriation. I feel it is important to make the Committee aware of our efforts in repatriation under the National Museum of the American Indian (NMAI) Act. I would like to temper comments made at the hearing with information on our activities and accomplishments to date.

Since 1991 the NMNH has provided approximately 150 Native American and Native Alaskan groups with unverified skeletal and object inventories either requested by those groups or distributed to them as part of on-going case work and consultation. The term unverified indicates that we have not yet completed a definitive search of our records and collections to determine the accuracy of readily available catalog information. The unverified inventories provide a starting place for further consultation, documentation, and collaboration with the tribes as the repatriation process moves forward. In the case of Alaska, for example, all of the Regional Native Corporations and many of the Village Native Corporations and IRA Councils have been provided with inventories of materials related to their areas. With inventory notification essentially complete, our case work in Alaska is presently focusing on returns, collaborative documentation, and further consultation and negotiation. Significant headway has been made with the distribution of unverified inventories in the Plains and the Northwest regions of the country. The Repatriation Office also is accelerating its efforts to complete similar coverage for Native groups in the Northeast, the Southeast, the Southwest regions of the country.

DEDICATED TO UNDERSTANDING THE NATURAL WORLD AND OUR PLACE IN IT

WASHINGTON DC 20560

More than 30 verified inventories also have been completed and distributed to Native groups in Alaska and the lower 48 states as part of the next step in the repatriation process. The verified inventory is a final, definitive report for groups that have submitted official repatriation requests. The report identifies all remains and funerary objects eligible for repatriation and makes recommendations for actual returns. I am submitting for your review a recent inventory report on the Apache and Yavapai Tribes of Arizona which is typical of the verified inventory reports we are producing. The verified inventories represent completed repatriation cases which have resulted in the return of approximately 1500 individuals to date. Another 1000 sets of remains also have been identified for return in the verified inventory process and are now awaiting repatriation. In sum, more than 30% of the Native groups eligible for repatriation in the United States have been provided with basic inventory data thus far.

It is particularly important to note that our repatriation efforts over the last four years have not focused exclusively on inventory and notification. Equally important to the repatriation initiative at Natural History has been a serious effort to engage in case work, complete a large number of returns, address long-standing repatriation requests, and carry out substantive consultations on repatriation with as many affected groups as possible. A considerable amount of time and staff effort have been expended on completing pending requests from Native groups, many of which include particularly sensitive remains recovered during the 19th and 20th centuries. A total of 80 requests have been received so far and in-depth consultations have been completed with most of these groups. The thirty cases completed to date have resulted in the return of both skeletal remains and funerary objects. Requests have been engaged on a first come, first serve basis and a concerted effort has been made to clear the large number of cases with remains which are closely related (genealogically) to living people. Many of these cases have included remains in the Army Medical Museum collections (remains dating primarily from military actions in the latter half of the 19th century) and those that date from late prehistoric and early historic archaeological sites.

Policy and guidelines for repatriation at the NMNH have been widely disseminated as part of our effort to provide information about the laws and process of repatriation. We have mailed our policy and guidelines statement to all federally recognized tribes as well as a large number non-federally recognized Native groups (copy of guidelines attached). In addition, we have carried out several workshops on repatriation for Native representatives in collaboration with the National Museum of the American Indian, the Keepers of the Treasures, the NMAI and NAGPRA Review Committees, and the National Park Service as well as local tribal councils and cultural organizations (sample agenda and registration for the Mille Lacs, Minnesota workshop attached). Repatriation staff at Natural History have made numerous presentations at a variety of national fora including the NMAI consultations, the Keepers of the Treasures meetings (both regional and national, Warm Springs Annual Meeting agenda attached), archaeological, anthropological, and museum conferences, as well as the NAGPRA Review Committee hearings (in Albany, Los Angeles, etc. [agenda attached]). We have also presented information on the size and character of our collections as well as our policies, procedures, and completed repatriations to regional Native organizations such as the Elders conferences at Point Barrow (agenda attached), Point Hope, and Nome, Alaska, the Apache Summit in Albuquerque, New Mexico, among others. We have collaborated on regional consultations with the Park Service and a

number of private museums (see attached agendas for Southeast Archaeological Center and Peabody Museum Tribal Consultation) in order to move our case work forward in coordination with other federal agencies and museums. We also have entered into cooperative agreements with a number of federal agencies in order to coordinate documentation efforts whenever possible (see attached example of MOU with the Bureau of Reclamation) and to reduce the total number of agencies with which tribal groups are required to interact. Many other consultation and outreach activities completed by the Repatriation Office at the NMNH, in addition to regular case work, are described in our Annual Reports for the last three years also included here for your review.

Clearly, both our strength and our focus to date has been to act on pending requests, to complete returns, and to carry out individual consultations with a large number of Native groups. It is difficult to give an accurate picture of the amount of time spent by our Repatriation Office staff on consultation with both Native groups and other institutions and organizations. Native delegations visiting Washington on business unrelated to repatriation regularly stop by our Office to ask about repatriation and to see objects or remains related to their tribe. Unannounced as well as scheduled visits are time consuming and frequently take staff away from planned repatriation tasks. Staff also frequently consult with museum professionals seeking information on repatriation procedures and other issues. We consider all of these activities to be necessary concomitants of the Museum's responsibility as a national leader on the repatriation mandate.

As part of its overall plan the repatriation program has emphasized case work with the understanding that completed cases represent a final response to the inventory and consultation mandate set out in the NMAI Act. Individual cases always present their own special problems and inevitably become more complicated and protracted than originally envisioned. The Pawnee repatriation request is a case in point. Consultation, negotiation and resolution of the Pawnee request for the return of skeletal remains from Kansas and Nebraska, dating back to the first millennium AD, have taken almost four years. In the process, however, this case has set precedents for the treatment of unidentified skeletal remains and also has demonstrated the effectiveness of our Review Committee at facilitating the resolution of disputes and protecting the interests of Native claimants in the repatriation process. I have included reports, correspondence, and the final judgement of the Review Committee in the Pawnee case as part of our statement for the record.

The repatriation effort at the NMNH also has attempted to shoulder some of the research and financial burdens that repatriation inevitably represents for the tribes. Unfortunately, appropriations to support the tribal half of the NMAI repatriation effort have never materialized. Tribal consultation and research on repatriation requires time, expertise, and money. The repatriation program has sought to address this problem in a number of different ways. First, we seek to contract with Native scholars and experts on repatriation documentation whenever possible. To date, we have contracted with six Native experts to complete documentation on cases unrelated to their own tribal affiliation totaling almost \$150,000. This kind of Native American participation in the repatriation process represents a positive approach to greater Native American involvement in the future of the Museum and a long-term remedy to the problems the legislation originally sought to redress.

We also support travel, lodging, and training of community scholars, Native interns, and official Native representatives to the Smithsonian and to conference and research locations in the field out of our own operating budget. All of this support is related to on-going repatriation cases and requires significant staff involvement. Community scholars come to Natural History for up to a month of sponsored research and work directly in collaboration with repatriation staff on their own cases. Native student interns spend a minimum of three months working in the Repatriation Office, learning research and collections management skills, and participating in the preparations for returns. We also arrange for and fund the travel of Native representatives to Washington, DC to recover remains and objects and prepare them, often ceremonially, for transport home. We have coordinated with other museums in the organization of joint repatriations held here in the capital in order to simplify the repatriation process for the tribes. In the case of the Pawnee repatriation we worked closely with the U.S. military to cover all of the arrangements for the return of 19th century Pawnee combat veterans to a final burial location in Kansas. Packing, transportation arrangements, and costs for all of the remains returned to date have been covered by the Repatriation Office at NMNH.

Recently the Repatriation Review Committee also has begun to make some of their funds available to tribes for repatriation consultation and research. Native representatives come to the Museum for the purpose of talking about the repatriation process and seeing objects and human remains in the collections that derive from their tribe. Travel and lodging for Native repatriation representatives comes through a grant program evaluated by senior Repatriation Office staff and targeted at some of the larger official requests. We estimate total funding directed to supporting the Native side of repatriation cases at NMNH, excluding the Review Committee grants, to be on the order of about \$250,000. This figure is difficult to calculate, especially in terms of the considerable amount of staff time invested, but should be viewed as a minimal estimate. Without a doubt, the financial costs and the amount of time spent by repatriation staff on DC consultations, other visitor-related activities, and returns is significant, but considering the long-term benefit to both the Museum and Native groups, the potential beneficial outcome more than balances the investment.

As an example of such a long-term investment, the Repatriation Office has begun to investigate technological solutions to the problems and costs of repatriation consultation and information exchange with Native groups. Object consultation requires face to face discussions and on-site examination of artifacts by Native experts and traditional religious leaders. Long-distance travel to Washington DC, however, is sometimes impossible for large groups or for elders. To address this problem, the Repatriation Office at NMNH organized an object consultation conducted by video hookup with Tlingit and Haida groups in Juneau, Alaska. All of the funding for the video conference was provided by outside sources, except for staff time invested in this project by the Department of Anthropology and the Repatriation Office at NMNH. The project, judged to be a success by all involved, represents one way that the NMNH is attempting to find creative solutions to the challenges represented by repatriation. Sharing information through the distribution of conventional inventory lists often represents just more bureaucratic red tape to the tribes. Reams of paper do little to help them identify sacred and patrimonial objects of real concern to traditional people. The video object consultation (short

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note in *Federal Archaeology* on the conference attached) represents one way we have collaborated with Native groups to seek more effective and meaningful approaches to both communication and repatriation.

In conclusion, I hope that the information provided here creates a clearer picture of the repatriation program at Natural History. I have tried to put the work we do, the time and effort expended, and our accomplishments thus far in context with the general issue of compliance with NAGPRA. The bottom line is that we feel we are responding aggressively to the repatriation mandate. The most important difference between repatriation at NMNH and at other museums responding to the repatriation mandate are the deadlines for summaries and inventories stipulated in NAGPRA. Many of the larger museums have requested extensions in order to comply with the inventory requirement. We believe that Natural History has an important responsibility to act as a national leader in repatriation and to balance our inventory responsibilities with meaningful consultations and actual returns. We take these responsibilities very seriously. This approach is certainly time consuming but we believe it also holds the potential to speed the overall course of repatriation and its final resolution. Presently, we are providing both inventories and summaries. We are also making a concerted effort to complete a large number of repatriations and to carry out an extensive program of consultation, outreach, and training with Native groups. We want to work with your Committee to resolve the NAGPRA compliance issue and continue the successful process of repatriation here at the Museum. In this spirit, I invite the members of the Committee and their staff to come to the Museum and see first hand the work we are doing in repatriation. Please contact me in the Department of Anthropology at NMNH or Dr. Thomas W. Killion, Program Manager in the Repatriation Office should the Committee require any additional information on repatriation or related issues at the Museum.

Sincerely,



Dr. Dennis Stanford, Chairman
Department of Anthropology, NMNH
Smithsonian Institution

**National Museum of the American Indian
Smithsonian Institution
Repatriation Office**

In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Repatriation Office has submitted the combined summaries and inventories of the NMAI collection to all Federally recognized tribes. The first mass mailing (sent to 743 tribes) was completed in November 1993. The second mailing (sent to 761 tribes), consisting of 5054 new entries in the NMAI database, was completed later than the legislated date of November 16, 1995 due to the government furlough. This mailing was completed on November 29, 1995.

According to Tim McKeown, the NAGPRA representative for the National Park Service, NMAI has surpassed the summary requirements of the first mailing. The requirement was to write a brief letter describing to tribes the percentage of items in the museum collection that originates from their tribe. However, NMAI sent to each Federally recognized tribe a detailed inventory of every item in the collection (approximately 1 million objects), that originates or may originate from that tribe (see Lee Callander's letter for an example).

According to the National Park Service, NMAI has also complied "in the spirit of the law" with the inventory requirement of NAGPRA by sending the above description. We have not, however, complied to the "letter of the law" regarding the timing of the consultation visits with tribes. According to the legislation, tribes were to be consulted about the contents of the NMAI collection before the inventories were sent out. There are two reasons this was not accomplished: 1) The NMAI collection is too large and covers too broad an area to have begun a verbal dialogue with every tribe in the two years between sending the summaries/inventories and November 16, 1995. 2) tribes have not been ready to begin a dialogue. In order to try to comply "in good faith", NMAI has invited any tribal delegates that would like to view the collection to come for a visit. To date, the majority of the tribes have not pursued this.

NMAI has tried to make repatriation consultation visits readily available (see the Repatriation Annual Report 1995, p. 5). Tribes have received written letters inviting them to come to the Research Branch, follow up calls have been made and NMAI/NMMH Repatriation Workshops have been conducted throughout the United States. NMAI also offers to pay for one round trip airfare to the museum for one tribal delegate to view the collection.

NMAI is trying to go beyond the boundaries of NAGPRA in taking the initiative of researching cultural affiliation and repatriation

of all human remains in the NMAI collection. The Repatriation Office has received \$170,000 of Trust money to hire contractors to research the cultural affiliation of human remains. Once a research report is complete NMAI approaches the appropriate Native community, asking them to take their remains back for reburial. The Repatriation Office pays for all research and the return of the remain(s), but not for reburial.

The human remains in the NMAI collection are what were considered "curiosities" that Heye kept when the majority of the Physical Anthropology collection was transferred over to the New York University School of Dentistry in the 1940s. What remains in the collection are fragmented bones with abnormalities or unusual circumstances, such as: vertebrae pierced with arrow points, skulls with deformities caused by disease, disjointed arm bones with bracelets still attached and mummies from the Archaic periods in the Southwest. The human remains in this collection have historic value, but are not what any scientist would call a "working collection". No physical testing has been or ever will be carried out on any human remains in the NMAI collection.

SUMMARY OF NATIONAL MUSEUM OF THE AMERICAN INDIAN
POLICY STATEMENT ON NATIVE AMERICAN HUMAN REMAINS AND CULTURAL MATERIALS,
ADOPTED BY THE BOARD OF TRUSTEES ON MARCH 4, 1991

I. PREAMBLE

This section gives background on the establishment of the National Museum of the American Indian through Public Law 101-185, which provided for the transfer to the Smithsonian Institution of the assets of the Museum of the American Indian, Heye Foundation in New York. It describes the sole authority of the National Museum of the American Indian board of trustees, subject to the general authority of the Smithsonian's board of regents, to lend, exchange, sell or otherwise dispose of any part of the collections of the museum.

The preamble notes that this policy applies to the repatriation of Native American human remains and funerary objects; repatriation of objects of religious, ceremonial and historical importance to Native American people; communally owned tribal property and other property acquired by or transferred to the museum illegally; and the treatment and display of Native American materials.

One of the museum's highest priorities is the expeditious implementation of its repatriation policy. It further establishes the general goals of the museum and notes that the wishes of Native Americans must be respected with regard to human remains and funerary objects and access to and treatment of ceremonial and religious materials. It also states that all Native American materials, which have been determined to be subject to repatriation, must be treated as the sole property of the affected Native American culturally affiliated group and must be treated with the utmost respect by scholars and interpreters of those cultures.

II. BACKGROUND

This section explains that the new policy extends the principles set forth in Public Law 101-185 with respect to repatriation of human remains and associated funerary objects to other categories of Native American objects--ceremonial and religious materials and communally owned Native property. It also notes that each repatriation request carries with it unique facts, circumstances and legal and ethical considerations.

III. POLICY

This section describes in detail the policy considerations with respect to each of six categories: Human Remains, Funerary Objects, Communally Owned Native American Property, Ceremonial and Religious Objects, Objects Acquired Illegally, and Duplicate or Abundant Objects. A brief summary of the main point of each category is summarized below:

Human Remains--On request of living descendants of the individual or the tribe or organization, the museum will repatriate any human remains that are reasonably identified as being those of a particular individual or of an

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individual culturally affiliated with a particular American Indian tribe or Native American organization.

Funerary Objects--The museum will repatriate any funerary objects associated with human remains, including any funerary object that is a surrogate for a deceased person. In addition, on request, the museum will repatriate to a particular American Indian tribe or Native Hawaiian organization any funerary object that is not associated with human remains but that is reasonably identified as having been removed from a specific burial site or culturally affiliated with that tribe or organization. Also, the museum will repatriate any other funerary objects found to have been acquired by or transferred to the museum illegally or under circumstances that render invalid its claims to them.

Communally Owned Native American Property--Communally owned property that belongs to an entire tribe, organization or group or was held for communal purposes and could not have been legally transferred or conveyed by any individual Native American to the museum will be repatriated on request.

Ceremonial and Religious Objects--This category includes objects needed by Native American religious leaders for the practice of traditional Native American religions. Because of the wide variety of objects regarded as ceremonial and religious, each request will be considered on a case-by-case basis in consultation with Native religious leaders in keeping with the American Indian Religious Freedom Act.

Objects Acquired Illegally--On request, the museum will repatriate to the appropriate American Indian tribe, Native Hawaiian organization or Native American group any materials acquired or transferred to the museum illegally or under circumstances that rendered the museum's claim invalid. Each request will be on a case-by-case basis.

Duplicate or Abundant Objects--The museum will consider requests for repatriation of duplicate or abundant items held in the museum's collections from Native Americans, American Indian tribes, Native Hawaiian organizations or Native American groups culturally affiliated with the material.

IV. PROCEDURES

This section notes that all repatriation decisions will be made by the museum's board of trustees on advice of its collections committee and describes a procedure for carrying out an inventory and for consulting with Native Americans during the repatriation process. Claims for materials may be submitted by descendants and by those who can demonstrate a cultural affiliation to the materials. This group of claimants includes, but is not limited to Native tribal, religious, ceremonial and Hawaiian organizational leaders. This section notes that the initial burden of proof with respect to any repatriation request is on the requestor to establish connection to the material in question.

The procedures section also describes the special review committee that will make recommendations about claims in dispute. This section further notes that certain items in the museum's collections are needed by

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traditional Native American religious leaders for the practice of Native American religions. The museum is committed to a policy of repatriation of these and other cultural materials. Where repatriation is not requested or where a repatriation agreement is not reached, the museum is committed to a policy of shared access and use of these materials as culturally appropriate. The museum will also offer technical assistance in the care, preservation, use and disposition of materials repatriated to tribes and organizations.

V. TREATMENT, CARE AND EXHIBITION

This section notes that the museum will develop and adopt a collections management policy describing detailed procedures for accession, deaccession, gifts, exhibition, display, handling, access and many other aspects of collections management. That policy will respect and accommodate the cultural and religious sensitivities surrounding the museum's collections. The museum will develop its detailed collections procedures in accordance with the policy that culturally specific information, data, documentation, reproductions and depictions--whether contained or transmitted in written, audio, visual or computer form--are the sole property of the affiliated group, and its consent regarding treatment, care and exhibition of its cultural materials must be obtained prior to decisions being made.

This section has five subsections relating to Exhibition and Display, Curation, Access, Outreach and Acquisitions. A summary of the main points of this section follows:

Exhibition and Display--Religious and ceremonial objects shall be exhibited or displayed only with the consent of the culturally affiliated group.

Curation--Curation and care of cultural materials will be carried out using the highest standards of museum practice and in consultation with the views of appropriate representatives from culturally affiliated groups.

Access--Access to the collections for viewing, study, performance of ceremonies and for other purposes of Native American people will be allowed to the maximum extent. Facilities will be constructed within the museum and/or under its auspices as appropriate for the purpose of conducting ceremonies. Public access to the collections for research, study or viewing purposes may be restricted if such access offends the religious or cultural practices of Native American peoples.

Outreach--Loans and exchange of cultural materials and traveling exhibitions will make the collections more widely available to Indian communities. The museum expresses its commitment to training of Native Americans and use of telecommunications and other technology to make its collections and activities more widely available.

Acquisitions--Title to all objects acquired for the permanent collections shall be obtained free and clear. This section describes the principles to be followed in acquiring objects for the collections.

**National Museum of the American Indian Policy Statement
on Native American Human Remains and Cultural Materials**

I. PREAMBLE

In November 1989, the National Museum of the American Indian Act became law. Public Law 101-185 provided for the transfer to the Smithsonian Institution of title to the assets of the Museum of the American Indian, Heye Foundation. The National Museum of the American Indian (hereinafter "Museum"), established by the Act, has a Board of Trustees which, subject to the general policies of the Smithsonian Board of Regents, has the sole authority to lend, exchange, sell, or otherwise dispose of any part of the collections of the Museum; purchase, accept, borrow, or otherwise acquire artifacts and other objects for addition to the collections of the Museum; and to specify criteria for use of the collections of the Museum for appropriate purposes, including research, evaluation, education, and method of display. Integral to fulfillment of that mandate is the affirmation that:

* Native American cultures and the collections that reflect those American Indian, Alaska Native and Native Hawaiian cultures provide a context for and constitute a rich part of the activities of the Museum.

* The goal of the Museum's repatriation policy is to support the continuation of ceremonial and ritual life among Native American peoples, to foster and support the study by Native Americans of their own traditions, and to forge consensus among the Museum and Native American communities while accounting for and balancing the interests of each.

* The wishes of Native American peoples with respect to the human remains and funerary objects of their own ancestors must be honored.

* The wishes of Native American peoples with respect to access to and treatment and use of ceremonial and religious materials needed in the practice of their religion must be granted.

* The Native American community must have broad access to and use of information pertaining to collection materials to ensure that informed decisions can be made regarding the treatment and disposition of Native American materials.

* All Native American materials, including human remains, funerary objects, ceremonial and religious objects, and communally-owned property, together with all culturally-specific information, must be treated as the sole property of the affected

Native American culturally-affiliated group and with the utmost respect by scholars and interpreters of those cultures, whether in collections research, scientific study, exhibitions, or educational programs.

* Respect for Native American peoples and cultures and principles of law prohibit the retention of Native American materials that were acquired by or transferred to the National Museum of the American Indian illegally or under circumstances that invalidate the Museum's claim to them.

* The Museum has, as one of its highest priorities, the expeditious implementation of its repatriation policy. To carry out this policy, there must be continuous dialogue between the Museum and Native peoples to assure that all viewpoints and beliefs are considered in its implementation.

* With respect to Native American peoples beyond the borders of the United States, this policy shall be carried out in accordance with the following procedures and applicable treaties and international agreements.

This statement describes the National Museum of the American Indian policy and procedure for: (1) the repatriation of Native American human remains and funerary objects; (2) the repatriation of objects of religious, ceremonial, and historical importance to Native American peoples, communally-owned tribal property, and other property acquired by or transferred to the Museum illegally; and (3) the treatment and display of Native American materials.

II. BACKGROUND

Over the years, a set of principles has evolved within federal policy regarding Native American religious freedom and the treatment and the repatriation of cultural materials. Certain of those principles, pertaining to human remains and funerary objects, were codified into law by Public Law 101-185. The National Museum of the American Indian is committed to a policy that extends the principles of the law to other categories of Native American objects, namely, ceremonial and religious materials and communally-owned Native property.

The initial focus of all repatriation requests involves the nature of the material in question and the circumstances of its acquisition by the Museum. Each repatriation request carries with it unique facts, circumstances, and legal and ethical considerations. Thus, each request of necessity must be reviewed individually within the Museum's overall policy framework.

III. POLICY

The National Museum of the American Indian is committed to the disposition, in accordance with the wishes of culturally-based Native Americans, of (i) Native American human remains of

known individuals; (ii) human remains of individuals who can be identified by tribal or cultural affiliation with contemporary Native peoples; (iii) funerary objects; (iv) communally-owned Native property; (v) ceremonial and religious objects; and (vi) objects transferred to or acquired by, or hereafter transferred or acquired by, the Museum illegally or under circumstances that render invalid the Museum's claim to them. Considerations associated with each type of material follow.

A. Human remains. The Museum will repatriate any human remains that are reasonably identified as being those of a particular individual or of an individual culturally affiliated with a particular American Indian tribe or Native Hawaiian organization, upon request of living descendants of the individual or of the particular tribe or organization. In addition, the Museum will repatriate to an appropriate descendant, tribe, or organization, upon request, any other Native American remains found to have been transferred to the Museum or otherwise acquired by the Museum illegally or under circumstances that render invalid its claim to them. Remains excavated pursuant to lawfully-issued permits under the Antiquities Act of 1906 will be deemed to have been acquired under color of law, but will be subject to repatriation if individually or tribally identifiable.

B. Funerary objects. The Museum will repatriate any funerary objects associated with human remains, to be repatriated in accordance with paragraph A above, including any funerary object which is a surrogate for a deceased person. With respect to funerary objects not associated with human remains, with the exception of surrogates addressed above, the Museum will repatriate to a particular American Indian tribe or Native Hawaiian organization, upon request, any funerary object that is reasonably identified as having been removed from a specific burial site or culturally affiliated with that tribe or organization. In addition, the Museum will repatriate any other funerary objects found to have been acquired by or transferred to the Museum illegally or under circumstances that render invalid its claim to them.

C. Communally-owned Native American property. The Museum recognizes that it holds in its collections certain objects that are communally-owned property of an American Indian tribe, Native Hawaiian organization, or Native American group itself, rather than property owned by an individual Native American person. If such property belonged to the entire tribe, organization, or group, or was held for communal purposes and could not have been legally alienated, transferred, or conveyed by any individual Native American, the Museum's claim to it is invalid, and such items will be repatriated upon request according to procedures established herein.

D. Ceremonial and Religious Objects. This category of materials consists of objects that are needed by Native American religious leaders for the practice of traditional Native American

religions, including the purpose of ceremonial renewal. Because objects regarded as ceremonial and religious by any given tribe may vary substantially from the objects so regarded by other tribes, this category of objects does not lend itself to a fixed set of guidelines. Thus, in keeping with the American Indian Religious Freedom Act, each request must be considered on a case-by-case basis in consultation with Native traditional religious leaders and practitioners. The Museum will seek the counsel of other tribal elders, members of the governing bodies and other representatives of the tribe making the request, and any other individuals who can provide relevant information to the specific request at hand.

E. Objects acquired illegally. The Museum will repatriate upon request to an appropriate American Indian tribe, Native Hawaiian organization, or Native American group any materials acquired by or transferred to the Museum illegally or under circumstances that render invalid the Museum's claim to them. Each request for materials so acquired will be considered on a case-by-case basis and take into account all relevant evidence submitted by the particular tribe, organization, or group and available to the Museum.

F. Duplicate or Abundant Objects. When the Museum has duplicate material, numerous similar objects in its collection, or an abundance of a certain type of material, and a Native American, American Indian tribe, Native Hawaiian organization, or Native American group that is culturally affiliated with the material requests its repatriation, the Museum will consider disposition.

IV. PROCEDURES

All repatriation decisions are made by the Museum Board of Trustees upon advice of the Collections Committee.

A. Inventory. The policy outlined above requires the Museum to have in place efficient procedural mechanisms to respond to repatriation requests. The National Museum of the American Indian will prepare an inventory of religious and ceremonial objects, funerary items, and all other cultural materials covered by this policy. The steps of such inventories are as follows:

1. Using the best available scientific and historical information, the Museum will identify the origin of human remains, funerary objects, and other objects covered by this policy.
2. Identification will be based on a reasonable belief standard.

3. The inventories will be made available to all affected American Indian tribes and Hawaiian Native organizations at the earliest opportunity.

4. The Museum will include in its inventories items that are not positively identifiable as being associated with a particular American Indian tribe or Native Hawaiian organization but, given the totality of information about the materials, make it more likely than not that the item once belonged to that American Indian tribe or Native Hawaiian organization or that the human remains are culturally affiliated with that group.

B. Consultation. During the inventory process and following its completion, the Museum will consult widely with Native American peoples. The Museum will disclose all relevant information pertaining to collection objects identified in the inventories, and curatorial staff will be available to respond to additional requests for information. Physical access to materials will be provided, as requested. In addition, a special area will be made available for Native American people to view or otherwise inspect their culturally affiliated materials. Every effort will be made to reach agreement through informal consultation and cooperation. Where issues remain after good faith discussions, those pertaining to human remains, funerary objects and other objects covered by this policy will be referred to a Special Review Committee established by the Board of Trustees.

C. Claimants. Claims for materials may be submitted by descendants and by those who can demonstrate a cultural affiliation to the materials. This group of claimants includes, but is not limited to Native tribal, religious, ceremonial and Hawaiian organizational leaders. If the Museum is uncertain about the cultural affiliation of the party requesting the materials, the Museum may request information about affiliation. If a request is made by one Native American group for the return of materials that the Museum believes may be more closely affiliated with another Native American group, the Museum will advise both parties of the request. All parties with a demonstrable interest will be invited to join in the negotiation and decision-making process. Where competing claims exist that cannot be resolved through informal consultation, the parties will submit the dispute to the Board of Trustees.

D. Burden of Proof. The initial burden of proof with respect to any repatriation request shall be on the requesting individual or tribe to establish, on a reasonable basis, a connection to the material in question. This connection may be lineal descent, tribal affiliation, and/or cultural affiliation. In some cases, this burden can be satisfied by reference to the

Museum's inventory which shall, wherever possible, identify descent, tribal origin, and/or cultural affiliation. Where the inventory is inconclusive or cannot determine affiliation, the requesting party may satisfy its burden through evidence of geography, descent, kinship, archaeology, anthropology, linguistics, folklore, oral tradition, historical patterns of ownership and/or control, and any other relevant information or expert opinion.

For human remains and funerary objects, once cultural affiliation has been satisfactorily established, the requesting party has met its burden of proof and the material shall be repatriated or otherwise disposed of in accordance with the wishes of the affiliated individual or tribe.

In the case of ceremonial and religious materials, the claimant must show that the materials are needed by traditional Native American religious leaders for the practice of traditional Native American religions. For communally-owned Native property, the requesting party must show that the material has an ongoing historical, traditional, or cultural relevance important to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, could not have been properly alienated, appropriated, or conveyed by any individual at the time the object was separated from such group. Once the claimant has satisfactorily established its case, and the Board of Trustees has affirmed its claim, the claimant is entitled to the material.

E. Special Review Committee on Repatriation. The Board of Trustees, upon being notified by the Museum Director or the American Indian or Native Hawaiian claimant that the discussions concerning repatriation have reached in impasse, shall, within fifteen (15) days, constitute a Special Review Committee to review the nature of the controversy, to examine the evidence presented by the parties in dispute, and to present its findings and recommendations to the Collections Committee within thirty (30) days. The Collections Committee shall then review the findings and recommendations of the Special Review Committee and shall, within fifteen (15) days, submit a recommended course of action to the Board of Trustees for its consideration in accordance with the provisions of Public Law 101-185, Section 5(C)(B), Sole Authority.

F. Access and Technical Assistance. The Museum recognizes that certain items in its collections are needed by traditional Native American religious leaders for the practice of Native American religions. The Museum is committed to a policy of repatriation of these and other cultural materials. Where repatriation is not requested, or where a repatriation agreement is not reached, the Museum is committed to a policy of mutual and shared access and use of these materials, as culturally appropriate. Access and use, in the form of availability of

materials for examination or for loan, will be within the purview of the collections management policy developed by the Collections Committee.

The Museum also is committed to a policy of offering American Indian tribes and Native Hawaiian organizations to which materials are repatriated, technical assistance in the care, preservation, use, and disposition of materials. Such assistance may encompass advice to tribal museums and training programs, where requested. Where repatriated materials may be altered or destroyed because of their sacred or traditional nature and function, the Museum shall obtain permission from the Native American owners prior to conducting any destructive analysis or documenting the existence of the materials through reproduction or graphic representation.

V. TREATMENT, CARE AND EXHIBITION

The National Museum of the American Indian will develop and adopt a collections management policy that describes detailed procedures for accession, deaccession, gifts, exhibition, display, handling, access, and many other aspects of collections management. That policy must respect and accommodate the cultural and religious sensitivities surrounding the Museum's collections. The Museum will develop its detailed collections procedures in accordance with the policy that culturally-specific information, data, documentation, reproduction and depictions--whether contained or transmitted in written, audio, visual or computer form--are the sole property of the affiliated group, and its consent regarding treatment, care and exhibition of its cultural materials must be obtained prior to decisions being made. The following collections management principles will guide the formulation and implementation of the collections management policy.

A. Exhibition and Display. Religious and ceremonial objects shall be exhibited or displayed only with the consent of the culturally-affiliated group. Before displaying religious, ceremonial, or potentially sensitive material as part of exhibitions or public programs, curators shall consult with interested and concerned parties and shall consider and be guided by their views in determining the method of display. Planning of exhibitions--format and content--shall be done in consultation with Native American representatives of the tribe and/or culture involved to assure historical and cultural accuracy in the presentation of all information and materials, and to avoid desecration, insensitive treatment, and inappropriate interpretation of religious or ceremonial materials.

B. Curation. Curation and care of cultural materials shall be done in accordance with the highest standards of museum practices and in consultation with the views of appropriate representatives from culturally-affiliated groups, particularly where culturally and religiously sensitive materials are involved. If an American Indian tribe, Native Hawaiian

organization, or Native American group requests that the Museum retain custody of religious, ceremonial, communally-owned, or other tribal property eligible for repatriation, they shall inform the curator and other appropriate staff regarding permissible methods of handling, care, and protection of such articles.

C. Access. Access to the collections for viewing, study, the performance of ceremonies, and for other purposes of Native American people shall be allowed to the maximum extent. Facilities will be constructed within the Museum and/or under its auspices, as appropriate, for the purpose of conducting ceremonies. Public access to the collections for research, study, or viewing purposes may be restricted if such access offends the religions or cultural practices of Native American peoples.

D. Outreach. Education constitutes an essential purpose of the Museum. Through the loan and exchange of cultural materials and travelling exhibitions the Museum will endeavor to make its collections more widely available to Indian communities and to present contemporary expressions on an ongoing basis. Provisions shall be made to furnish materials and information to Native people through, but not limited to, the application of telecommunications and other technologies. The Museum also is committed to training Native American people in museology by developing a full curriculum of programs at all levels--senior management, administration, curatorial, technical, fellowships, support, and security.

E. Acquisitions. Objects will not be acquired by gift, purchase, or exchange unless the provenance is complete and consistent with principles of law and policy established by the Museum and the Smithsonian Board of Regents. In its acquisition practices, the Museum endorses and abides by the principles of the UNESCO Convention and the American Indian Religious Freedom Act. The Museum will consult with all concerned parties before acquiring materials that may be culturally or religiously sensitive. Further, the Museum will not accept archeological materials unless they have been excavated in compliance with appropriate international agreements, negotiated tribal agreements, federal laws and guidelines, and such other state and local laws as may be applicable.

Title to all objects acquired for the permanent collections shall be obtained free and clear. As a general rule, the Museum must not accept gifts with restrictions as to use or future disposition. The Museum may, however, permit exceptions to this policy for materials that are religiously or culturally sensitive and where the donor imposes restrictions on access, display, research, treatment, storage, or care. Under exceptional circumstances, and with approval of the Board, the Director may accept objects with restrictions or limitations, provided that the condition shall be stated clearly in the instrument of conveyance and made a part of the records.

Whenever an item of cultural property covered by this policy shall be offered or gifted to the Museum, or whenever it shall come to the attention of the Museum that such item is or is about to be placed on the market for sale, trade or exchange, the Director shall notify the appropriate American Indian tribe, Native Hawaiian organization, or Native American group of the known circumstances. To the extent feasible, and upon the request of the culturally-affiliated tribe or group, the Museum will coordinate efforts with the tribe or group to recover or obtain a treatment-and-care agreement, as appropriate.

The National Museum of the American Indian
Smithsonian Institution,
Repatriation Office

**The Repatriation Office
1995 Annual Report**

Prepared by Sonya Wolff
October 1, 1995

DRAFT

The Repatriation Office (RO) at the National Museum of the American Indian (NMAI) was established in 1990 in accordance with the National Museum of the American Indian Act (NMAIA), 20 U.S.C. Section 80q (Public Law 101-185). The NMAI Act requires the Smithsonian Institution to prepare an inventory of Native American human remains and funerary objects and to repatriate such material on request to culturally affiliated Native Americans. The Act authorizes the assembly of a Board of Trustees and empowers them to write policy. The Collections Policy, written by them in 1992, contains the implementation for the repatriation of sacred objects and items of cultural patrimony. The NMAI has also voluntarily adopted the principles contained in the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. Section 3001 (Public Law 101-106), for the inventory and repatriation of sacred objects and objects of cultural patrimony.

In accordance with NAGPRA, the RO has submitted the combined summaries and inventories of the NMAI collection to all Federally recognized tribes. This mass mailing was completed in November 1993. At present, a second mailing is being organized to inform Native American groups of approximately 5,000 new entries in the NMAI database.

This 1995 Annual Report of the Repatriation Department of the National Museum of the American Indian reports on the activities and progress of the department, as well as the present status of research through the end of the 1995 fiscal year.

I. THE NMAI HUMAN REMAINS COLLECTION

As part of the development of the RO, a Human Remains Vault (HRV) has been established, and all human remains known in the collection have been removed from general storage areas and are now housed in the HRV.

The NMAI collection records contain 534 catalogue entries for human remains (HRs)¹. Some of these catalogued remains are no longer in the collection, some have been deaccessioned for repatriation or for other reasons². Currently, there are 268 human

¹ This is the total number of catalogued human remains entries. Some catalogue numbers include more than one remain; these remains are considered one unit or project.

² Seventy-three of these entries are for HRs that are no longer in the collection (this includes 36 LOWs). The NMAI Board of Trustees has deaccessioned 193 catalogue entries from the museum

remains catalogue entries in the collection. These catalogue entries have been grouped into 104 various-sized projects (mainly by geographic location or by collector) to facilitate the completion of the research reports³.

Table I Summary of Human Remains Catalogue Numbers (HRCN) and Reports

| | |
|--|-----|
| Total number of HRCN catalogued in database: | 534 |
| Total number of HRCN present in the HRV: (includes those already deaccessioned) | 329 |
| Total number of HRCN left to deaccession: | 268 |
| Total number of HRCN no longer in collection: | 266 |
| Inventory LOW 36 | |
| Exchanged 10 | |
| Removed 12 | |
| Discarded 01 | |
| Transferred 13 | |
| Presented 01 | |
| Deaccessioned 193 | |
| Total number of HRCN repatriated: | 132 |
| Total number of HRCN catalogued as medicine to date: | 73 |
| Total number of research reports (projects) needed: | 98 |

Currently, there are a total of 73 medicine bundles containing HRs in the collection. Human remains which are part of medicine bundles are considered to be bundles rather than HRs. It was decided by the NMAI staff and the Traditional Care Committee that medicine bundles containing HRs will not be rehoused to the Human Remains Vault, but will remain in their current location until they are repatriated or the Repatriation Office is instructed otherwise.

collection. Of the deaccessioned collections, 132 have been repatriated.

³ "Repatriation: The Status of Human Remains Research" by Wolff, Sonya F., and Kathleen E. Ash-Milby, Department of Repatriation, 1995. (Also referred to as the "Scope Report").

II. THE REPATRIATION OFFICE: RESEARCH

For the last year, the primary focus of the research section of the RO has been to organize and prioritize the repatriation of HRs in the collections of the NMAI. To date all known HRs in the collection have been rehoused in the Human Remains Vault; the Human Remains Database has been updated; a Scope Report was prepared detailing the status of all remains still present in the collection; three new researchers were hired and the whole research process was put into full swing.

The Human Remains Database is maintained on a Q&A program and includes records of all known HRs in the NMAI collection. This database is an adaptation of the Registration database and was completed in the Fall of 1993. Since then, entries for HRs found in the collection have been added to the database. Through the updating process, several Registration problems have been resolved, remains have been located through shelf-searches, and all unidentified bones in the collection have been identified by a physical anthropologist.

In November 1994, scholarly procedures were established for research reports on HRs and sacred items subject to repatriation. Since that time ten repatriation reports have been written. Four of these reports have been approved by the Collections Committee (a delegation of the Board of Trustees) and the objects deaccessioned. Four reports are awaiting review by the Collections Committee (these reports are discussed in more detail below) and two have just be completed. Of these ten reports there have been two reports on sacred items, including the Blackfeet Thunder pipe, and the Iroquois Wampum Belts. Both are awaiting review by the Collections Committee in October.

Table II Repatriation Reports

| | |
|--|----|
| Total number of repatriation reports completed: | 10 |
| Number of repatriation reports reviewed by the Board of Trustees: | 4 |
| Number of repatriation reports awaiting review by the Board of Trustees: | 4 |
| Number of repatriation reports on HRs: | 8 |
| Number of repatriation reports on sacred items: | 2 |

Since 1989, the RO has received eight formal repatriation requests from Native groups. Three requests have been for ceremonial items: The Blackfeet have requested the return of a Thunder Pipe; the Iroquois have requested Wampum Belts and False Face Masks; and the Omaha have requested a White Buffalo Hide and a Pipe. Three requests by the Cheyenne River Sioux, the Crow and the Cherokee Nation have been for human remains. Two tribes, the Hopi and the Menominee, have asked for all affiliated materials in the NMAI collection and have declared intellectual property rights over all information related to their tribes.

Table III Repatriation Requests Since 1989

| <u>Requestor</u> | <u>Items Requested</u> | <u>Type of Items</u> |
|----------------------|--------------------------|----------------------|
| Blackfeet | Thunder Pipe | Sacred/Ceremonial |
| Iroquois | Wampum | Sacred/Ceremonial |
| | False Face Masks | Sacred/Ceremonial |
| Omaha | White Buffalo Hide | Sacred/Ceremonial |
| Cheyenne River Sioux | Human Remains | |
| Crow | Human Remains | |
| Cherokee | Human Remains | |
| Hopi | All affiliated materials | |
| Menominee | All affiliated materials | |

III. RECENT FUNDING FOR REPATRIATION RESEARCH

In the winter of 1995, the Repatriation Office was awarded \$170,000 of Trust money by the Board of Trustees to increase the staff and hasten the repatriation of HRs. The two researchers, Patrick Tafoya and Chris Fragnito, both of Indian decent, have been hired on two year contracts at \$25,025 per year: two years for both researchers totals \$100,100. The remaining \$69,900 will be used to hire regional scholars to conduct research on an "as needed" basis.

Toward this goal, Mr. Marty Sullivan, Director of the Heard Museum in Arizona, was hired to research the Wampum Belt request by the Iroquois. Mr. Sullivan was paid \$4,125 for his final report which is presently up for final review by the Board of Trustees.

In addition, the RO is negotiating a contract with Karen Kramer for research reports for Southwest HRs in the collection. Karen Kramer is an established archaeologist and a Ph.D. student at the University of New Mexico. In 1994, Kramer completed extensive preliminary research on a large portion of the HRs from the Southwest during an internship at the Repatriation Office and is in good standing at NMAI. If negotiations are successful she will develop the preliminary reports into finished scholarly ones.

IV. REPATRIATION OUTREACH

Since the RO was established there have been a total of 29 repatriation consultation visits. The Native American groups are listed in the table below:

Table IV Repatriation Consultation Visits to the National Museum of the American Indian

| | |
|-------------------------|----------------|
| 1. Osage | January 1993 |
| 2. Jemez Pueblo | October 1993 |
| 3. Iroquois | November 1993 |
| 4. Zuni | March 1994 |
| 5. Blackfeet | September 1994 |
| 6. Poundmaker Cree | November 1994 |
| 7. San Carlos Apache | December 1994 |
| 8. Eastern Shawnee | December 1994 |
| 9. Absentee Shawnee | December 1994 |
| 10. Menominee of WI | January 1995 |
| 11. Skokomish | February 1995 |
| 12. Navajo Nation | February 1995 |
| 13. Nez Perce | March 1995 |
| 14. Yakima | March 1995 |
| 15. Oneida of NY | March 1995 |
| 16. Coyote Valley Pomo | April 1995 |
| 17. Hualapai | May 1995 |
| 18. Oneida of WI | May 1995 |
| 19. Gila River | June 1995 |
| 20. Jicarilla Apache | June 1995 |
| 21. Hopi | July 1995 |
| 22. Tulalip | July 1995 |
| 23. Kaw | July 1995 |
| 24. Squaxin | July 1995 |
| 25. Standing Rock Sioux | July 1995 |
| 26. Hoopa Valley | August 1995 |
| 27. Saginaw Chippewa. | August 1995 |

Since 1989, the RO has received eight formal repatriation requests from Native groups. Three requests have been for ceremonial items: The Blackfeet have requested the return of a Thunder Pipe; the Iroquois have requested Wampum Belts and False Face Masks; and the Omaha have requested a White Buffalo Hide and a Pipe. Three requests by the Cheyenne River Sioux, the Crow and the Cherokee Nation have been for human remains. Two tribes, the Hopi and the Menominee, have asked for all affiliated materials in the NMAI collection and have declared intellectual property rights over all information related to their tribes.

During September and October 1995, repatriation consultations were not scheduled due to the temporary inaccessibility of the photographic and paper archives. In November, when the archives reopen, the consultations will resume with visits by the Kutenai and the Hoonah.

The Repatriation Office is continuing outreach efforts with Native American communities. Twice a year the RO co-sponsors a workshop on repatriation with the National Museum of Natural History⁴. These workshops take place on tribal lands and are open to any regional Indian group that would like to attend. However, the workshops are targeted toward tribes that are coping with repatriation issues. The main objectives of the workshops are to allow NMAI to initiate contact with Native representatives and to educate both Native Groups and the museums on repatriation issues within specific regional areas. The February 1995 workshop, held in Palm Springs, California, was sponsored by the Agua Caliente Cultural Museum. The second workshop was held in September 1995 at the Mille Lacs Indian Reservation in Mille Lacs, Minnesota.

V. REPATRIATION OFFICE STAFF

At present, the Repatriation Office consists of only two staff members: Sonya Wolff and Karen Brockman. A search is currently underway for a Repatriation Manager under a Schedule A structure. The Administrative Assistant position has recently been vacated. Patrick Tafoya and Christopher Fragnito are contracted researchers hired on a two-year basis and are paid with Trust money.

Sonya Wolff. Research Assistant GS 9, 2-year term appointment. Sonya has an MA in Archaeology from Cornell University. She began working on October 11, 1994 under the supervision of Ray Gonyea. She was hired as a researcher to help facilitate the return of HRs

⁴ Alice Sadongi from the Public Programs Department coordinates and orchestrates the Repatriation Workshops. Without her help these workshops would not be possible.

in the NMAI collection. At present she is acting as the assistant to the Acting Repatriation Manager, presently George Horse Capture.

Karen Brockman. Research Assistant GS 7, 2-year term appointment, Oneida. Karen has an MA in Anthropology from the University of Colorado and a Museum Studies Certificate from George Washington University. She is the most recent addition to the Repatriation Office and began work on September 5. She is primarily working on research reports for the return of HRs, but will also work on tribal consultation visits. In addition she will help fulfill the duties of the Administrative Assistant until a replacement is hired.

Patrick Tafoya. One-year Contract Researcher (equivalent to a GS 7), Navajo. Patrick has an MA in Divinity from Harvard University. He is a contract researcher hired to research projects related to HRs in the collection.

Christopher Fragnito. One-year Contract Researcher (equivalent to a GS 7), Mohawk from Canada. Christopher has a BA in History and English from Concordia University. He is a contract researcher hired to research projects related to HRs in the collection. He will be starting work on October 16, 1995.

IV. SUMMARY OF CASES

During 1995, two repatriations (for HRs) have taken place, and 13 projects (for HRs and sacred objects) have been started and are at various stages of completion. Detailed descriptions of these projects follow below.

Cases Completed and Repatriated in 1995

1. **Diegueno.** In the fall of 1995, 77 human remains and associated funerary objects were repatriated to three bands of the Diegueno Indians of Southern California. The three bands include the Viejas Band of Mission Indians, the Santa Ysabel Mission Indians and the Mesa Grande Band of Mission Indians. The collection was acquired from E. H. Davis in the early 1900s.

2. **Shuar Achuar.** This report was completed by Assistant Curator Nancy Rosoff. All remains were deaccessioned by the Board of Trustees in the Spring of 1995. Ms. Rosoff and the Repatriation Office consulted with the Shuar Federation concerning the return of the 12 Tsantsas (shrunken heads). They were returned on October 6, 1995, with the assistance of a member of the Shuar Federation while visiting the United States for the Indigenous Leaders Conference.

Human Remains Deaccessioned

1. Burr's Hill. This report was completed by Assistant Curator Eulalie Bonar. The Board deaccessioned the remains in the spring of 1995. The remains are affiliated with the Wampanoag Tribe of Rhode Island, however, there are several situations which have delayed their repatriation. The first difficulty is that the majority of the Wampanoag Tribes are only state recognized. There is one Federally recognized Wampanoag group, but they do not have any interest in the Burr's Hill material. Secondly, there are multiple claims for the Burr's Hill material including a claim by the Federally recognized Narragansett Tribe. The RO is in the process of exploring the situation with the Wampanoag Nation of Rhode Island.

2. Oneida. This report was completed by Assistant Curator Cecil Ganteaume. The remains were deaccessioned by the Board in the spring of 1995. At present there are internal political complications among the Oneida of New York, so the Board has decided to hold them until the next Board meeting in October 1995. The RO is awaiting the decision of the Board of Trustees.

Human Remains Reports in Progress

1. Alabama--Charlotte Thompson Place. This report was completed by Patrick Tafoya and will be reviewed by the Collection Committee. The report covers one remain collected by C. B. Moore from an area known as Charlotte Thompson Place in Alabama. There are no associated funerary objects. The cultural affiliation is difficult to assess, however, based on the historical background of the area it has been determined that the remain is probably affiliated with the Choctaw Indian people. It is Mr. Tafoya's recommendation to return the HRs to the Choctaw tribes.

2. Kansas--Child's Hand with Bracelet. This report was written by Erica Brick, an intern, and is awaiting review by the Collection Committee. The report covers one remain and a few associated funerary objects from the Sherman Collection. The cultural affiliation is undetermined. It has been recommended that the remain be repatriated to the Kansas Unmarked Burial Sites Board.

3. Hawikuh. The majority of the Hawikuh HRs have previously been deaccessioned and transported to the National Museum of Natural History in 1993 at the request of the Pueblo of Zuni. Subsequently, three additional undocumented Hawikuh remains were located during a vault search in the NMAI collection. This report will be written by Assistant Curator Eulalie Bonar, but because of her work on the Textiles Project, it has been put on hold until the new year.

4. Durand's Bend. This report has just been completed by Patrick Tafoya, and is awaiting approval of the Curatorial Council. This collection consists of three HRs and several associated funerary objects collected by C. B. Moore in an area known as Durand's Bend in Alabama. The cultural affiliation has been determined to most likely be Choctaw.

5. Peru. Ramiro Matos is writing this report with the help of Jessica Streibel who has already completed the preliminary archival research. In total there are 13 HRs from Peru and no associated funerary objects. The project has been temporarily put on hold until the end of the Indigenous Leaders Conference in October. The report should be finished by late December.

6. Diegueño Medicine Man (#11/6921). Sonya Wolff began research on this remain, but due to current staffing problems in the Repatriation Office this report has temporarily been put on hold. Her research will resume when the Repatriation Manager is hired. This remain was collected by E. H. Davis and is of Diegueno ancestry.

7. Delaware. This report was initially prepared by Laura Mussio, an intern, and is being rewritten by Assistant Curator Eulalie Bonar. The report will consist of two HRs from the Throgs Neck and Brooklyn areas of New York. They are both likely affiliated with the Delaware Indian people.

8. Human Skull Rattle (#22/3213). Research on this remain has recently been started by Karen Brockman. It is probably related to a group of HRs that were deaccessioned by the Board of Trustees in 1993 and returned to the Seneca of New York. The previously deaccessioned and repatriated remains did not have a report written to the current standards.

9. Vertebra with Arrow Point (#21/4320). Karen Brockman has recently completed her report for this remain. It is probably related to a group of HRs that were deaccessioned by the Board of Trustees in 1993 and returned to the Cayuga of New York. The previously deaccessioned and repatriated remains did not have a report written to the current standards. This report is awaiting approval of the Curatorial Committee.

Sacred Items

1. Blackfeet Thunder Pipe. The Blackfeet Indian people visited NMAI for a repatriation consultation in September 1994. Upon locating the Thunder Pipe, the Blackfeet wrote to the NMAI formally requesting its return. The tribe borrowed the pipe for one year while the request was considered. The research report and request for repatriation, written by Ray Gonyea and George Horse Capture,

is presently awaiting review by the Collections Committee.

2. Iroquois Wampum Belts and False Face Masks. There has been a long-standing correspondence history between the Iroquois and the Museum of the American Indian, Heye Foundation. In the Spring of 1994, the NMAI received a formal request, under the guidelines of NAGPRA, from the Iroquois for the return of all Wampum Belts and False Face Masks that are culturally affiliated with the Six Nations. Dr. Martin Sullivan, Director of the Heard Museum, was hired to do the research report for this request. This report is now awaiting review by the Collection Committee. Presently, no one is assigned to research the False Face Masks.

VII. BUDGET 1995 (At present these figures are not finalized)

| FUND and INTENT | Amount Budgeted | Amount Spent |
|--|--------------------|--------------------|
| <u>RPOPS</u> | | |
| 521 Travel | | |
| - Staff travel to Washington, DC. | \$2,000 | \$1,612.55 |
| - Professional conferences | \$5,000 | \$3,665.61 |
| Special Travel - Transportation | | |
| - Tribal delegation repatriation visits | \$30,000 | \$9,413.50 |
| - HR & Sacred Object escort | \$13,000 | \$2,749.41 |
| - South American symposium | | \$2,058.00 |
| TOTAL TRAVEL | \$50,000 | \$19,499.07 |
| 522-523 Transport and Rental | | |
| - HR and Sacred Object return | \$10,000 | \$0.00 |
| 525 Contracts - Tech./Prof. Services | | |
| - Mail service re-announcing intent to repatriate | \$5,000 | \$5,000.00 |
| - Listing repatriated items in the Federal Registry | \$5,000 | \$5,000.00 |
| - Researchers for repatriation reports and consultations | \$20,000 | \$5,347.00 |
| TOTAL = | \$90,000 | \$15,347.00 |
| REMAINING = | | \$44,846.07 |

RPSUP

| | | |
|------------------------------|-----------------|--------------------|
| 526 Supplies - | | |
| - Research books, pub. | \$3,000 | \$5.28 |
| - Laptop Computer | \$3,000 | \$3,068.00 |
| - Office Supplies | \$3,000 | \$380.48 |
| - Copies | \$3,000 | \$0.00 |
| - Shipping supplies for HR's | \$7,000 | \$7,644.79 |
| - Photo supplies | \$1,000 | \$99.30 |
| TOTAL = | \$20,000 | \$14,197.85 |
| REMAINING = | | \$5,802.15 |

RPTRAIN

| | | |
|------------------------------|----------------|-------------------|
| 525 Staff Development | | |
| - Professional conferences | \$2,000 | \$995.00 |
| - NMAI Workshops | \$3,200 | \$320.00 |
| TOTAL = | \$5,200 | \$1,315.00 |
| REMAINING = | | \$3,885.00 |

IN SUMMARY

| | | |
|----------------------|------------------|--------------------|
| REPOPS | \$90,000 | \$44,846.07 |
| RPSUP | \$20,000 | \$5,802.15 |
| RPTRAIN | \$5,200 | \$3,885.00 |
| GRAND TOTAL = | \$115,200 | \$54,533.22 |
| REMAINING = | | \$60,666.78 |

DRAFT

REVISED DRAFT 3/17/95

NATIONAL MUSEUM OF THE AMERICAN INDIAN
REPATRIATION PROCEDURESI. INTRODUCTION

The National Museum of the American Indian (hereinafter referred to as "NMAI" or "the Museum") was established by Act of Congress on November 28, 1989 (hereinafter referred to as "NMAI Act"). In establishing NMAI, Congress granted sole authority to the Board of Trustees over accessions, deaccessions, loans, exchanges, sales, and all other aspects pertaining to use of the collections. As part of its authority over collections, the Board of Trustees adopted a Collections Management Policy on September 11, 1992 which includes a Section on Repatriation, a copy of which is attached hereto as Appendix A.

The Museum has as one of its highest priorities the expeditious implementation of its repatriation policy. To carry it out and to assist Native people in preparing and submitting claims to NMAI for repatriation, the following procedures have been developed. The cornerstone of these procedures is NMAI's commitment to continuous dialogue between the Museum and Native American people to assure that all viewpoints and beliefs are considered in its implementation.

II. INVENTORY

A. General. In accordance with the NMAI Act and Repatriation Policy, NMAI has prepared a computerized inventory of its collections to be used for purposes of identifying objects in the collections that may be eligible for repatriation. The purpose of the inventory is to facilitate repatriation by providing clear descriptions of objects and establishing the cultural affiliation between the objects and present-day Native Americans and tribes.

B. Steps. The steps of the inventory process are as follows:

1. Using the best available scientific and historical information, the Museum will identify funerary objects, communally-owned Native American property, ceremonial and religious objects and other objects covered by this policy.

2. Identification will be based on a reasonable belief standard.

3. The inventories will be made available to the official tribal government of all affected Native American tribes at the earliest opportunity.

4. The Museum will include in its inventories items that are not positively identifiable as being associated with a particular American Indian tribe but, given the totality of the information

about the materials, make it more likely than not that the item once belonged to that American Indian tribe.

C. Consultation. During the inventory process and following its completion, the Museum will consult widely with Native American peoples. This shall include, but not be limited to:

- (1) lineal descendants;
- (2) Indian tribe officials;
- (3) traditional religious and ceremonial leaders; and
- (4) Indian community scholars with specialized knowledge.

With respect to consultation with tribal officials and traditional religious and ceremonial leaders, the Museum shall consult with those:

- (1) *From whose tribal lands the materials originated;*
- (2) *That are, or are likely to be, culturally affiliated with the materials; and*
- (3) *From whose aboriginal lands the materials originated.*

III. REQUESTS FOR REPATRIATION FROM TRIBES

A. General. Letters requesting repatriation shall be sent in writing to the Director of the Museum:

W. Richard West, Jr., Director
 National Museum of the American Indian
 Smithsonian Institution
 470 L'Enfant Plaza, Suite 7103, MRC 934
 Washington, D.C. 20560

A copy should be sent to the Repatriation Office of the Museum:

Repatriation Project Manager
 National Museum of the American Indian
 3401 Bruckner Boulevard
 Bronx, New York 10461
 (718) 828-1176
 (718) 828-0980 (facsimile)

The Director will acknowledge the request in writing, provide a copy of the Museum's Repatriation Policy and these procedures (if not already made available), and a copy of the printout of the relevant collections inventory. A copy of the acknowledgement letter will be sent to the Repatriation Office which will be the principle point of contact in the Museum for repatriation activities.

B. Specific Information. All requests shall refer to specific objects by reference to the inventory and/or specific catalogue numbers as well as the physical description. The request should indicate the category of repatriatable material into which the objects falls, i.e., funerary object, communally-owned Native

American property, ceremonial and religious objects, objects transferred to or acquired by the Museum illegally or under circumstances that render invalid the Museum's claim to them. The request should provide the basis for the classification of objects into these categories.

C. Provision of Information from the Tribe. Upon request by the Museum, the tribe shall provide the following additional information:

(1) Name and address of Indian tribe official(s) authorized to act as representative in consultations related to particular objects; and

(2) Recommendations on how the consultation process should be conducted, including names and appropriate methods to contact any lineal descendants, traditional religious leaders, or Indian community scholars who should be consulted; and

(3) Recommendations for further inquiry in the event the inventory process has failed to produce sufficient information as to whether the object fits into a repatriatable category and/or whether sufficient evidence of cultural affiliation exists.

D. Provision of Information from the Museum. During inventory consultation, NMAI will disclose all relevant information pertaining to collection objects identified in the inventories. The information shall be provided in writing to lineal descendants, when known, and to officials and traditional religious leaders representing Native American tribe that are, or are likely to be, culturally affiliated with the materials. Included in the information shall be:

(1) A list of all Indian tribes that are, or have been, consulted regarding the particular objects;

(2) A general description of the conduct of the inventory;

(3) A projected time frame for conducting the inventory;

(4) An indication that additional documentation used to identify cultural affiliation will be supplied upon request.

(5) Accession and catalogue entries;

(6) Information relating to the acquisition of each objects including (i) name of the person or organization from whom the object was obtained, if known, (ii) the date of acquisition, (iii) the place each object was acquired, i.e., geographic location, and (iv) the means of acquisition, i.e., gift, purchase, or excavation;

(7) A description of the objects, including dimensions, materials, and, if appropriate, photographic documentation and the antiquity of such objects; and

(8) A summary of the evidence used to determine cultural affiliation.

(9) Relevant studies that may bear on geographic origin, cultural affiliation, and basic facts surrounding the acquisition and accession of the materials.

IV. RESOLUTION OF REPATRIATION REQUESTS

A. **Burden of Proof.** The initial burden of proof with respect to a repatriation request shall be on the requesting individual or tribe to establish, by a reasonable basis, (i) that the object requested falls into a repatriatable category; and (ii) that the requesting party has a connection to the material in question, whether by lineal descent, tribal affiliation, and/or cultural affiliation.

1. **Repatriatable Objects.** The objects that are subject to repatriation fall into certain categories as defined by the NMAI Act and Museum policy.

a. **Funerary Objects.** Funerary objects are defined as objects that, as part of a death rite or ceremony of a culture, are reasonably believed to have been intentionally placed with an individual of known affiliation at the time of death or later. The Museum will repatriate any funerary objects associated with human remains, including objects which are surrogates for deceased persons. The Museum also will repatriate to a particular tribe, upon request, any funerary object that is reasonably identified as having been removed from a specific burial site culturally affiliated with that tribe.

b. **Communally-owned Native American Property.** Property held by the Museum that is property of the Native American group itself, rather than property owned by an individual Native American is considered communally-owned property. If such property belonged to an entire tribe, organization, or group, or was held for communal purposes and could not have been legally alienated, transferred, or conveyed by an individual Native American, these items will be repatriated upon request.

c. **Ceremonial and Religious Objects.** These are objects that are needed by Native American religious leaders for the practice of traditional Native American religions, including the purpose of ceremonial renewal. Ceremonial and religious objects may include intellectual property such as photographs, recordings, videos, field notes, archival materials, and other similar tangible and intangible property that is directly associated with the confidential and proprietary realms of Native American religious and ceremonial practices. Requests for return of these items will be considered on a case-by-case basis in consultation with Native American traditional religious leaders and practitioners.

d. **Objects Acquired Illegally.** This category consists of objects acquired by or transferred to the Museum illegally or under circumstances that render invalid the Museum's claim to them.

e. **Duplicate or Abundant Objects.** These include duplicate material, numerous similar objects in the collection, or an

abundance of a certain type of material.

f. Intellectual Property. This category consists of photographs, field notes, audiotapes, videotapes, archival records, and other forms of oral and written documentation containing information that is integral to protecting the confidentiality and proprietary realms of Native American religion.

2. Cultural Affiliation. The second prong in establishing a valid request is the connection between the requesting party and the objects. That connection may be based on lineal descent, tribal affiliation, and/or cultural affiliation. In some cases, the burden can be satisfied by reference to the Museum's inventory. Where the inventory is inconclusive or cannot determine affiliation, the requesting party may satisfy its burden through evidence of geography, descent, kinship, archaeology, anthropology, linguistics, folklore, oral tradition, historical patterns of ownership and/or control, and other relevant information or expert opinion.

B. Review of Information. The staff of the Repatriation Office initially will review all information relevant to a particular request, and will follow-up with the tribe if information is missing or if additional materials are needed to evaluate the claim. The initial focus of all repatriation requests involves the nature of the material in question and the circumstances of its acquisition by the Museum. Each repatriation request carries with it unique facts, circumstances, and legal and ethical considerations. Therefore, each request must be reviewed individually. The Repatriation Office staff will consult with Museum curators and other staff within the Museum in researching and evaluating the request.

C. Experts. If deemed necessary by the Museum and/or the tribe to evaluate a specific request, the Museum may retain experts as may be needed, such as Indian community scholars, specialists in tribal traditions, persons in the fields of anthropology, archaeology, and history to assist in evaluating cultural affiliation. Whenever possible, the Museum will work with Indian tribes to select experts who are mutually acceptable to the Museum and the tribe.

D. Conflicting Claims. If multiple claims are submitted, or if the Museum's research suggests that the materials may be more closely affiliated with a Native American tribe or tribes other than the requesting party, the Museum will notify the tribe submitting the request and all other possible claimants. All parties with a demonstrable interest will be invited to join in the consultation, negotiation, and decision-making process. The Museum may retain the objects until such time as all requesting parties mutually agree upon the appropriate recipient or until a final decision is made by the Board of Trustees in accordance with

these procedures.

E. Visitation. During the consultation phase, and after receipt of information from the Museum, if the tribe deems it necessary to visually inspect the materials, the Museum will provide travel funds for at least one representative to visit the collections. Visits shall be scheduled by contacting the Repatriation Office. Visitors are permitted access to the collections and museum records and may photograph and/or videotape collection materials subject to the Museum's conservation and lighting guidelines. Photographs may also be ordered through the Photography Department according to the current fee schedule. Staff members can advise requestors about the documentation and photographs of objects in the Museum's collections.

F. Status of Collections During Consultation Phase. During the pendency of the claim and before a final decision is reached, the Museum will continue to care for and treat the collections subject to the repatriation request with dignity, respect, and sensitivity. As a general policy of the Museum, objects will continue to be made available for research if there is no compelling reason to believe that an object raises the concerns of the group identified with it. However, if the tribe has specific concerns about the handling of specific objects including, for example, whether the objects should be photographed or otherwise accessible to non-tribal members, the Museum will work closely with the tribe to accommodate its concerns. Whenever there is a conflict between a desire for public or scholarly access to materials by individuals not affiliated with the group identified with the materials, and the desire of representatives of that group to protect the materials from access in order to preserve the traditions and integrity of the culture, the wishes of the group's representatives will prevail. (See Museum Research Policy)

G. Impasse. If, during the consultation phase, discussions concerning repatriation have reached an impasse, the Board of Trustees shall, upon being notified by the Director, constitute a Special Review Committee within fifteen days. The Special Review Committee, which will consist of members of the Board and, if advisable, other individuals with expertise invited by the Board to participate, will review the nature of the controversy, examine the evidence presented by the parties in dispute, and present its findings and recommendations to the Collections Committee of the Board of Trustees within thirty days. The Collections Committee shall review the findings and recommendations of the Special Review Committee and shall, within fifteen days, submit a recommended course of action to the Board of Trustees for its consideration.

V. RECOMMENDATION AND DECISION

A. Recommendations. Upon completion of research, documentation, consultation and resolution of any conflicting

claims, the Repatriation Office will submit a recommendation for action to the Director of the Museum. If the Director approves the recommendation, it will be submitted to the Collections Committee of the Board of Trustees for action and recommendation to the full Board of Trustees. If the Director disagrees with the recommendation or believes that additional research is required, the Director may either refer the matter back to the Repatriation Office staff or refer the matter to the Collections Committee of the Board of Trustees with separate recommendations.

B. Final Decision. All final decisions regarding repatriation shall be made by the Board of Trustees in accordance with the National Museum of the American Indian Act.

C. Notification. The Director will notify the requesting party(ies) of the final decision of the Board of Trustees. If the decision is in favor of repatriation, notice of the Museum's intention to repatriate will be published in a variety of newspapers designed to provide the widest practicable notice to all actually and potentially interested parties. Radio notices will also be provided through the stations most likely to reach all interested persons. The Museum may seek the assistance of the requesting party in identifying suitable other means and locations for providing notice. The Notices will provide that any interested person shall have thirty (30) days in which to object to the repatriation. Unless any objection is made in writing within that time period, the materials will be returned no later than thirty (30) days after the notice period has expired and the Museum will no longer have any responsibility for such objects.

D. Objection to Notice. In the unlikely event that an objection is received during the notice period, it will be reviewed by the Repatriation Office staff to determine its validity. If the reason for the objection is based on a conflicting claim, the Museum will follow the procedures set forth above for resolving conflicting claims and will refrain from repatriating the materials until all conflicting claims are resolved.

VI. REPATRIATION

A. General. The Museum shall consult with the tribe regarding the arrangements for return. Under standard procedures, objects will be packed in suitable containers and shipped to the location and individual specified by the requesting party. The authorized representative of the tribe will be asked to sign a receipt and release form acknowledging receipt of the objects. Alternatively, the Museum will pay for one of its staff members to escort objects to their final destination if the tribe so requests.

B. Record of Repatriation. The Museum shall use standard deaccession procedures to permanently document the content and recipients of all repatriations. Standard deaccession procedures

shall include, for human remains: measurements of the skeletal remains, observation of traits such as gender and age, pathology of the individual such as sickness or injury, condition of skeletal remains, and a complete documentary search of Museum records related to the remains, their accession, and history. For other materials, measurements, descriptions and a complete documentary review shall be conducted. Other procedures such as x-ray or photography, reproduction of the skeletal remains or materials, or destructive scientific analysis of the materials prior to repatriation shall not be done unless the Museum has first obtained the consent of the tribe. If photography is not permitted, the Museum may sketch or draw the materials.

C. Procedures for Repatriation Records. If the tribe permits the Museum to take photographs or make other replicas as part of the deaccession process but does not want the documentation to be made available to the general public following repatriation, the Museum shall take steps to ensure that such information is not released. Such materials may be placed in sealed envelopes or in a locked vault with access restricted to staff and affiliated tribal members.

D. Handling of Objects. The Museum shall notify the tribe of any presently known treatment of objects with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.

E. Costs. The Museum will use good faith efforts to make space available on the Museum's premises for the preparation and packing of the objects by tribal representatives including the performance of related ceremonies. The Museum will not be responsible for any costs for special affairs, religious observances, or any other materials or services that the requesting party may deem appropriate in conjunction with the repatriation of objects.

F. Religious Objects. The Museum will pay for one representative of the requesting party to travel to New York for one overnight stay to pick up and escort especially sensitive religious objects to their final destination. These objects will be packed in containers suitable for carry-on baggage in an aircraft cabin if possible. It is recommended that artifacts not be checked as baggage.

G. Receipt and Release. The Museum will submit a Receipt and Release Form to the tribe for review and signature to confirm, in writing, that the materials have been received by the tribe. The Receipt and Release transfers all responsibility for the materials to the tribe and holds the Museum harmless from any future claims to the materials.

H. Conditions of Return. The return of materials in

accordance with these procedures to the tribe is based on the presumption that the tribe will, in the case of human remains and funerary objects, rebury them in the ground. In the case of sacred objects and cultural patrimony, the presumption is that the materials are needed by the tribe for religious practices and cultural renewal and will be retained permanently by the tribe. Therefore, an implied condition of repatriation is that the tribe will not transfer, sell, alienate or other traffic in these materials for financial gain or otherwise, nor authorize others to do so. If the Museum has a good faith reason to believe that the repatriated materials may, following return, be transferred, sold, or otherwise alienated by a member of the tribe without the tribe's authorization, the Museum may impose contractual conditions on the return that require the tribe to permanently retain the materials.

VII. INTERNATIONAL REPATRIATIONS. The Museum will consider international requests on a case-by-case basis, taking into consideration, among other factors, whether the requesting tribe is located on or near the United States border with Canada and Mexico and has members in the United States and whether the country requesting the materials has a policy of reciprocity with respect to repatriation of Native American materials.

VIII. POST-REPATRIATION PROCEDURES.

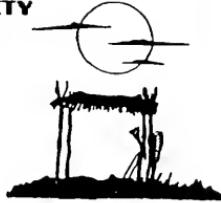
A. Technical Assistance. The Museum is available to provide technical assistance in the care, preservation, use, and disposition of materials following repatriation. Such assistance may include advice to tribal museums and training programs, if requested.

VIII. ALTERNATIVES TO REPATRIATION. Under certain circumstances, the Museum may propose alternatives to repatriation for the tribe to consider. Alternatives may include, for example, retention by the Museum of the object for care and conservation, with the understanding that the tribe will have access to the object as needed for religious or ceremonial purposes.

* Additional materials submitted by the Smithsonian Institution will be kept on file in the Senate Committee on Indian Affairs.

WESTERN SHOSHONE HISTORIC PRESERVATION SOCIETY

ELKO INDIAN COLONY
1581 PINENUT CIRCLE
ELKO, NEVADA 89801
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November 30, 1995

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The Honorable Senator John McCain
Chairman
United States Senate
Senate Committee On Indian Affairs
Washington, D.C. 20510-6450

Dear Mr. Chairman:

The enclosed document is in relation to the Senate Oversight Hearing on NAGPRA scheduled for December 6, 1995, at the Russell Senate Building at 9:30 a.m.

Contemporary Native American Indian Burials are being destroyed and desecrated, as they were in the past, and legally in a manner of speaking today, and measures must be taken to hinder or distort this activity.

Indian Cemeteries must be given a form of legal justice in order to safe-guard them from future mitigation and or excavation. Hopefully the contents of this document can provide an avenue that will enhance the concerns and interest of the Native American Indian in their plight to preserve and protect their Traditional Indian Cemeteries and or Burial Sites.

If you have any questions, please feel free to contact this organization. Thank you for your time in this matter and for viewing this document.

Sincerely,

Larry Kibby

Larry Kibby, Program Director
W.S.H.P.S.

DATE: November 28, 1995
TO: Senate Committee On Indian Affairs
FROM: Larry Kibby, Consultant/Director
Western Shoshone Historic Preservation Society
SUBJECT: **Senate Oversight Hearing On NAGPRA**

On November 16, 1990, the United States 101st Congress enacted the Native American Graves Protection and Repatriation Act(NAGPRA)-H.R. 5237(P.L. 101-601), for the purpose of providing for the protection of Native American Indian Graves and for other purposes.

Under NAGPRA, Section 2 DEFINITIONS (i) "burial site" means any natural or prepared physical location, whether originally below, on or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

Under NAGPRA, Section 2 DEFINITIONS (5) "Federal Lands" means any land other than tribal lands which are controlled or owned by the United States.

Under NAGPRA Section 3 OWNERSHIP (a) Native American Human Remains and Objects-.

WHEREAS, in relation to this Oversight Hearing on NAGPRA, the Senate Committee On Indian Affairs does need to justify a term directed at "Contemporary Native American Indian Burials", that are in fact "Burial Sites", located on "Federal Lands", that should be "Owned" and "Managed" by those Sovereign Nations claiming "Ownership".

WHEREAS, due to "THE INDIAN REMOVAL ACT"(1830): certain Indian Lands became "Federal Lands", in which some "Indian Cemeteries" and "Burial Sites" became a part of the "Public Domain", which has led to Anthropology and Archaeology "Ownership", that did in fact lead to unnecessary excavations of "Native American Indian Human Remains and or Sacred Objects", from these declared Native American "Indian Cemeteries" and or "Burial Sites".

WHEREAS, due to "THE GENERAL ALLOTMENT ACT"(1887): certain Indian Lands became "Federal Lands", in which some "Indian Cemeteries" and "Burial Sites" became a part of the "Public Domain", which has led to Anthropology and Archaeology "Ownership", that did in fact lead to unnecessary excavations of "Native American Indian Human Remains and or Sacred Objects", from these declared Native American "Indian Cemeteries" and or "Burial Sites".

WHEREAS, due to "THE RELOCATION ACT"(1956): certain Indian lands became "**Federal Lands**", in which some "**Indian Cemeteries**" and "**Burial Sites**" became a part of the "**Public Domain**", which has led to Anthropology and Archaeology "**Ownership**", that did in fact lead to unnecessary excavations of "**Native American Indian Human Remains and or Sacred Objects**", from these declared Native American "**Indian Cemeteries**" and or "**Burial Sites**".

WHEREAS, fact, NAGPRA does allow for Repatriation of Remains and or Sacred Objects from Museums and other such places, to identify Burial Sites, and for the Sovereign Nations to declare Ownership of regarded Funerary items, however, NAGPRA does not resolve the fact that, Native American Indian Cemeteries and or Burial Sites, are still being excavated, due to their existence on Federal Lands, declared to be a part of the Public Domain.

WHEREAS, Indian Cemeteries and or Burial Sites, located on the Public Domain, under management of such federal agencies as the U.S. Forest Service, Bureau of Land Management and National Parks Service, have in fact been addressed by the Anthropology and Archaeology Community as to being either Prehistoric and or Historic, and Federal Property.

WHEREAS, fact, NAGPRA does allow for Consultation with the Sovereign Nations, Government to Government, in relation to the findings of Prehistoric or Historic Sites, that may or may not contain Burials, on Public Lands, however, NAGPRA does not allow for any Legal Protection of Indian Cemeteries and or Burial Sites, which are still being utilized by the Sovereign Nations to this date for burial of their Tribal Member's, and that are located outside of Reservation Boundaries, on so-called Public Domain, considered to be the Legal Traditional Territory of the Sovereign Nations, leading to possible Mitigation and or excavation of these sites, by Archaeologist.

WHEREAS, legal factor's, Federal and State Laws, are structured favorable to Anthropologist and Archaeologist and or therein of, towards declaring such sites on Federal Lands as property of the Federal Government, and that all due consideration of these areas must be established towards the Anthropologist and Archaeologist Community, with sincere regard of the Scientific Research and or Data that can be obtained and utilized to evaluate the past, in order to enhance the education of Man for future generations.

WHEREAS, because Anthropologist and Archaeologist consideration is established and given priority, such Indian Cemeteries and or Burial Sites such as the Wells, Nevada Indian Cemetery and the Ruby Valley, Nevada Indian Cemetery(enclosed data), that are located on Federal Lands are not addressed in any form of either Federal and or State laws that assure the Preservation and or Protection of.

WHEREAS, due to the Relocation and Reservation Down-sizing of the Native American Indian and their reservations, some Indian Cemeteries and or Burial Sites, were not moved, due to Traditional Respect, therefore, such Sites are located on what is now known as Federal Lands and are not a legal part of the lands of the Sovereign Nations.

WHEREAS, due to Relocation and Reservation Down-sizing, such Indian Cemeteries and or Burial Sites such as the Wells, Nevada Indian Cemetery, Ruby Valley, Nevada Indian Cemetery, Rock Creek, Nevada Burial/Cemetery, Cherry Creek Range, Butte Valley, Nevada Cemetery, have been and are still being utilized for Traditional Burial's and cared for by the Native American Indian Community, though in such cases as the Rock Creek, Nevada Burial/Cemetery, and the Cherry Creek Range, Butte Valley, Nevada Cemetery, use of, was discontinued, though they are located on the Public Domain and Living/Lineal Descendants do protest any form of destruction or desecration therein of.

WHEREAS, due to priority regards provided to the Anthropology and Archaeology Community, such areas as the Rock Creek Burial/Cemetery and the Cherry Creek Range, Butte Valley, Nevada Cemetery are not afforded legal protection and become available for near future Mitigation and or for Excavation, because they are located on the Federal Lands.

WHEREAS, Indian Cemeteries and or Burial Sites are a valid part of the Tradition and Traditional Belief of the Sovereign Nations, not of New Age Theory or Philosophy and not afforded any manner of respect by some Anthropologist and or Archaeologist, nor is there any form of legal protection for them.

THEREFORE, the Senate Committee On Indian Affairs must promote an Amendment for the Native American Graves Protection and Repatriation Act of 1990, to where a constructive form of Legal Justice will prevail for the Sovereign Nations in their endeavor towards the Preservation and Protection of their Native American Indian Cemeteries and or Burials, located on Federal Lands, understood to be the Public Domain.

FURTHERMORE, the Senate Committee on Indian Affairs must promote an Amendment for the Native American Graves Protection and Repatriation Act of 1990, to where a legal description can be established for such Indian Cemeteries and or Burial Sites as; the Wells, Nevada Indian Cemetery, Ruby Valley, Nevada Indian Cemetery, the Rock Creek, Nevada Burial/Indian Cemetery and the Cherry Creek Range, Butte Valley Cemetery, in order to legally secure Protection of such Indian Cemeteries and or Burial Sites, located on Federal Lands, understood to be the Public Domain, managed by such agencies as the Bureau of Land Management, U.S. Forest Service and National Parks Service, to where they can not be labeled as Prehistoric and or Historic, eligible for Mitigation and or Excavation, by Anthropologist and or Archaeologist.

FURTHERMORE, the Senate Committee On Indian Affairs should Amend the Native American Graves Protection and Repatriation Act of 1990, to include separation of Federal Funds with a larger amount directed to the Sovereign Nations and not to those institutions such as Museums, whom have discriminately been revered with an unnecessary priority, endorsed by the Anthropology and Archaeology Community.

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FURTHERMORE, the Senate Committee On Indian Affairs should Amend the Native American Graves Protection and Repatriation Act of 1990, to include such language that will distort the Theory and Philosophy of the New Age Organizations and or Groups, and that such language will advocate a legal endorsement of the Sovereign Nations Tradition and Traditional Belief, so that Indian Cemeteries and or Burial Sites will not become a Public mockery or a tool to be used for personal and or monetary gain.

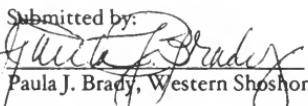
FURTHERMORE, the Senate Committee On Indian Affairs should Amend the Native American Graves Protection and Repatriation Act of 1990, to include such language to where full priority shall be established for the Sovereign Nations of the Native American Indian to fully identify, manage and own, Indian Cemeteries, Burial Sites and those Funerary Objects of Sacred identity and all other such Artifacts, discovered inadvertently or otherwise on Federal Lands, managed by those Federal Agencies such as the Bureau of Land Management, U.S. Forest Service and the National Parks Service.

FURTHERMORE, the Senate Committee On Indian Affairs must Act in Good Faith, in order to secure a realm of long over due Justice, necessary for the Preservation and Protection of Indian Cemeteries and or Burials, with the understanding that our Ancestor's are not the Anthropologist or Archaeologist Prehistoric People, but are Grandfather's, Grandmother's, Aunts and Uncles, relatives of Contemporary Native American Indians, that should be left where they have been laid to rest with Traditional Respect.

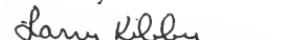
THEREFORE LET IT BE STATED CLEARLY, that the Senate Committee On Indian Affairs should in a manner of respect install such legal factor's relevant to the Preservation and Protection of ALL NATIVE AMERICAN INDIAN CEMETERIES and or BURIAL SITES, within the text of the Native American Graves Protection and Repatriation Act of 1990, so as to where those Sovereign Nations of the Native American Indian will know that the United States Government is upholding it's TRUST OBLIGATION, TREATY OBLIGATION, in a GOVERNMENT to GOVERNMENT manner as so declared under Article VI of the United States Constitution.

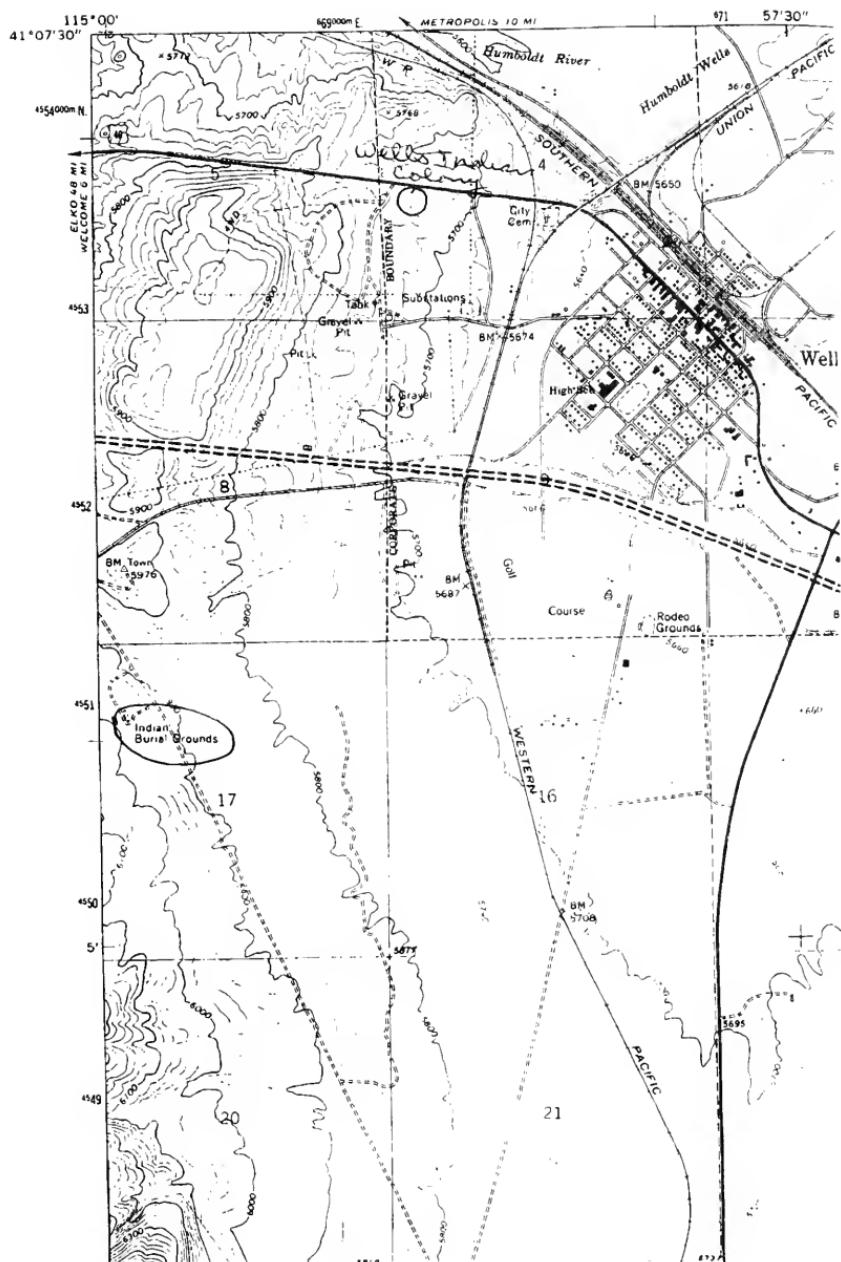
AND LET IT BE FINALLY STATED, that the Senate Committee On Indian Affairs does endorse the Tradition and Traditional Belief of those Sovereign Nations of the Native American Indian, so that a Legal Manner can be established within the Native American Graves Protection and Repatriation Act of 1990 for the Preservation and Protection of ALL INDIAN CEMETERIES and or BURIAL SITES.

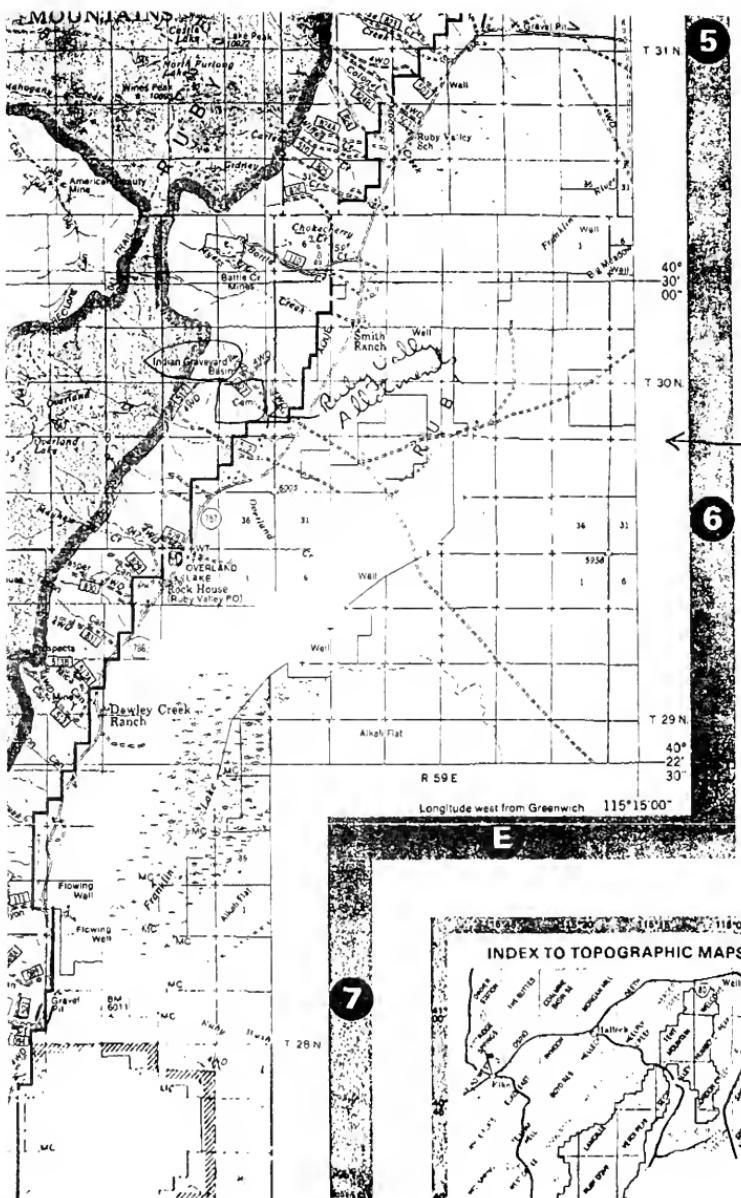
Submitted by:


Paula J. Brady, Western Shoshone Historic Preservation Society

Testimony Of:


Larry Kibby, Program Director
Western Shoshone Historic Preservation Society





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